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Union College, Schenectady. Trustees.
To the regents of the University
of the state of New York.

TO THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW-YORK.

The undersigned, in behalf of the trustees of Union College,

Respectfully Reports:

That it having been frequently stated of late, both in Schenectady and elsewhere, that a very large amount of money received under the grants made to Union College remained unaccounted for; that the board of trustees had held meetings in Albany; and that they had elected a trustee who resided out of the State, which acts are both contrary to law; that in conformity to the report of a committe made at the late meeting in Albany, changes in the Professorships and in the Professors were supposed to be in contemplation, that would not be submitted to. From these facts, and from the fact that the trustees have been distinctly forewarned, that unless some of the imputed changes in contemplation were abandoned by the trustees, the authority of the Regents and of the Legislature would be brought to bear upon them in that behalf: From these facts, and the further fact, that in fulfilment of this forewarning, repeated and unusual calls have been made by the Regents and the House of Assembly, requiring an account in detail of certain fiscal transactions for the last twenty-five years; in one of which calls from the Assembly, the mover, (as reported in the Argus,) stated "that this College had never made any report conformable to law, and always accompanied the brief report made to the Regents with a protest against the power of the Regents to require it, or their obligation to make it:" from these facts it has seemed reasonable to infer that these unusual calls have been made in consequence of errors imputed to the trustees, and that they are intended to secure the correction of the same.

But however originating and to whatever end directed, it is admitted that the imputations have been of such a nature as fully to justify the calls made by the Legislature on the one hand, and to require a full and frank response from the trustees on the other.

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As these imputed fiscal delinquencies of the trustees in their reports to the Regents and to the Legislature, are coupled together in the call from the Assembly, a common answer has been so framed as to supply said imputed delinquencies in former reports to both; which answer not only contains the reasons which have governed the trustees during the past, but also their views and wishes for the future.

And the same having been sent to the Assembly is now embodied in this report to the Regents.

As to the informal meetings of the trustees in Albany, the undersigned has only to say, that they have, it is believed occurred only when the design of the meetings was merely to collect the individual opinions of those present on questions that required no immediate action; that these meetings were appointed in Albany for the convenience of the ex officio trustees, and always with a full understanding that the decisions made there would have no legal validity until the same were received and ratified at a subsequent regular meeting held in Schenectady.

As to the election of a trustee out of the State, the trustees appear to have acted in conformity to the usage in other colleges, and nothing in their charter inhibits a conformity to such usage. During the reduction of the number of the trustees, in conformity to the act of March 30, 1805, removal from the State would, it is admitted, create a vacancy, till the entire reduction contemplated took place, because the board of trustees had filed their consent in the Secretary's office that it should be so. But as to filling vacancies, when vacancies were allowed by law to be filled, they are not aware that any reason, legal or otherwise, exists, why they should not be filled, when expedient, from another State.

As to the vacating and filling of professorships, the undersigned knows nothing more than what is contained in the minutes of the board, and as it is believed that here, as elsewhere, the trustees have nothing to conceal from the Regents in relation to their acts, he has copied into this report the only acts of the trustees in relation to that subject, (and those informal,) of which he has any knowledge, and which consist in the adoption of the report of a committee, which report is in the following words:

"The committee to whom was referred the consideration of a change in the course of study to be pursued; what changes may be made with advantage in the existing professorships, what professorships

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may be abolished, and what new ones instituted in their places; what changes may properly be made in the number and details of the existing course of studies in order the better to adapt the same to the existing wants of the community; the expediency of adapting the diplomas of the institution to a more specific description of the attainments of the students in particular branches of science; what provision ought to be made for any officers of the college, who, after years of faithful service, may, from the infirmities of age or ill health, be constrained to retire from the more laborious duties of their stations; and to report the name of a candidate duly qualified for the Professorship of Moral Philosophy, and who shall be also qualified to discharge the duties of Vice-President of the institution, and the names of persons deemed most competent to fill the other professorships recommended by them to be established, do respectfully

"REPORT:

In part, that they have had the several subjects referred to them under consideration, and have had two special meetings of the committee in respect to the same, but they are not yet prepared to report in full. Your committee are strongly impressed with the conviction that some important changes may advantageously be made in the course of collegiate instruction, and in the principles upon which the honors of the institution shall be conferred. The subject is one of much difficulty, and the committee are not prepared at this time to state in detail all the alterations which it may be proper ultimately for the board of trustees to adopt. But they are satisfied that a more liberal provision ought to be made for instruction in the application of science to the useful arts; in Civil and Topographical Engineering; in the French and other modern languages; in Ancient and Modern History, and in the elements of general Jurisprudence. They are also of the opinion that such latitude of choice ought to be allowed to students in the departments of study which they shall pursue, that the honors of the institution may be awarded in some form to every young man who shall distinguish himself by persevering and successful devotion to any liberal branch of knowledge.

"The present state of the funds of the college are such that it is impossible immediately to provide for the best instruction in all the different branches of science which your committee think should ultimately be pursued in the institution, and of course all the professorships which they propose to establish cannot be filled at present. Although they concur in the recommendation of the Regents of the University, that the study of the French and other modern languages

should, in the present state of the world, be pursued in all our colleges as a part of the regular course of instruction, your committee find that the funds will not enable the trustees, at present, to commit that department of science to the charge of a Professor. Your committee recommend an entire change of all the professorships in the institution, from and after the next commencement, and that the five first of the professorships hereinafter recommended be filled by the trustees by election at the annual meeting of the board the day preceding such commencement; that such professorships be filled, either from the present numbers of the faculty, or from other persons, as the trustees shall deem most conducive to the interests of the institution; but that the trustees give due and respectful attention to the claims of the gentlemen who are the incumbents of the professorships which are to be abolished at that time. And as the present Professor of the Greek and Latin languages, on account of his advanced age, may not desire to be elected to any chair under the new organization, your committee, in consideration of his long and faithful services, recommend that until he can be otherwise provided for, or the further order of the board, he be requested to accept the title of Emeritus Professor of ancient languages, and occupy the house where he now resides and receive the annual sum of $500 in quarterly payments.

"In conformity to these views, your committee recommend the adoption of the following resolutions:

Resolved, That from and after the next commencement, all the professorships in the college as at present established, be abolished, and that the following organization be substituted therefor:

"The president of the college shall not be charged with instructing in any particular branch of science as the professor thereof, but he shall have the general superintendence of all the professorships, and of the several teachers in the college. He shall also instruct any of the classes or sections of classes in such branches of science as he shall from time to time deem most for the interests of the institution.

"There shall be a professor of moral philosophy and rhetoric, who shall act as vice-president, and who, under the president, shall have the general superintendence of the police of the college.

A Professor of Ancient Languages and Literature.

A Professor of Mathematics, pure and applied.

A Professor of Mechanics, practical and theoretical.

A Professor of Natural History and Chemistry.

A Professor of the French and other modern languages, and Literature.

A Professor of Agricultural Chemistry and Chemistry as applied to the Arts.

A Professor of Civil and Topographic Engineering.

A Professor of Ancient History and Philosophy.

A Professor of Modern History.

A Professor of Law and Civil Polity.

A Professor of Anatomy and Physiology.

"*Resolved*, That the several professors, in addition to the appropriate duties of their respective professorships, be charged with instructing in such other branches of literature as may from time to time be assigned to them by the president of the college or the board of trustees.

(Signed) R. H. WALWORTH,
Chairman."

To return to the imputed fiscal delinquencies, the same are responded to, as stated in the report of the trustees to the Legislature in the words following:

TO THE HONORABLE, THE ASSEMBLY OF THE STATE OF NEW-YORK.

The undersigned respectfully states that a copy of the resolution of the house, passed March 12th 1849, in the words following:

"*Resolved*, That the Trustees of Union College, be, and they are hereby required to report, forthwith, to this House, a true statement of all the property owned by said college. That they show in said report, in what manner the funds of said college are invested, and what changes in the investment thereof have been made within the last ten years, specifying the same particularly; what amount of stocks are held by said college and in what companies; what amount of money is loaned on the security of mortgages; to whom and in what sums; what other securities are held by said college, specifying the character and the amount loaned on each security; and that they cause such report to be verified by the oath of their President and Treasurer of said college."

And also the subsequent resolution passed March 21st, 1849, extending that requirement to the period of twenty-five years, came to hand in due course of mail.

Immediately on the receipt of the aforesaid resolutions, the president of Union College, on his own responsibility without waiting for a meeting of the board of trustees, which could not be convened under twenty-one days, directed the undersigned forthwith to commence the making out of a schedule of all the grants heretofore made to Union College, and of the manner in which the same has been invested; of the losses which have been sustained; of the present state of each of the permanent separate fund accounts; of the revenue arising from each, and the manner in which each has been applied; also of the changes which have taken place in the investment of each, and to accompany the same with as much minuteness of detail as possible,

considering the variety of subjects to which the enquiries of the Assembly relate, the many years to which they extend, and the shortness of the time allowed for making the same.

In conformity to the above direction the undersigned proceeded to examine the books (22 in number) containing the fiscal transactions during the last twenty-five years; and he has completed the duty assigned him with as much despatch and as great detail, as the claims of other duties on his time would allow. And he now presents to the Assembly the result of his labors, in the following schedules and the remarks accompanying the same.

SCHEDULE I

Containing a Statement of all the Acts in which grants have been made to Union College, together with the amounts, irrespective of interest, granted and received.

1. By the act of April 9, 1795, for the purchase of Library and apparatus, ... $3,750 00

2. By the act of April 11, 1796, for the erection of building, ... 10,000 00

3. By the act of March 30, 1797, seven hundred and fifty dollars a year for two years, for the support of a Professor, which sum was wholly applied to that purpose, and nothing therefore remained to be accounted for.

4. By section 1 of the act of March 7, 1800, for the completion of the College edifice, ... 10,000 00

5. By section 3 of same act, ten military lots were granted, of 550 acres each, for the support of the President and Professors,..... 43,483 93

6. By the act of April 8, 1801, and of April 3, 1802, arising from the Garrison lands, by the Regents,... 9,378 20

7. By the act of March 30, 1805, by lottery, eighty thousand dollars, the net avails of which, after deducting interest paid into the State Treasury and otherwise, amounted to, (see Assembly Journal, for 1814, page 118; also note to Schedule V.)..... 55,000 00

8. By the act of April 13, 1814, and of April 5th, 1822.
   1. For the erection of buildings,..... $100,000

Carried forward,..... $ $

Brought forward,.....	$	$
2. For paying an existing debt, ...	30,000	
3. For Library and Apparatus,.....	20,000	
4. For the relief of indigent students,....	50,000	
		200,000 00
		$331,612 13

Note to 8th Grant.—It having been stated that the above lottery for the promotion of literature could be drawn in six years, interest was provided in the grant, for that length of time, and as this was expected to be the case, the expense authorized for buildings, charity students, &c., was immediately incurred; but such was the great delay in the drawing of the lottery, that at the end of nine years not a cent of the principal had been received, and only about four and a half years of the interest, and now at the end of thirty years, the whole of the avails of this lottery has not yet been received by Union College, though all the institutions interested therein have been by Union College fully paid.

The above statement of grants made to Union College by the State, and the net avails thereof, is believed to be correct, and that it will be found to be so by referring to the Comptroller's reports, and the Journals of the Assembly hereinafter referred to. Still the undersigned has observed that it has sometimes been stated by speakers in the Legislature, and even by committees in their reports, (see Assembly Journal for 1823, page 138,) that grants had been made to a much larger amount. This error it is presumed has arisen, in part at least, from assuming that the whole balance belonged to Union College which remained to be raised by the "Lottery for the promotion of Literature," when said College assumed the management thereof under the act of April 5, 1822, "to limit the continuance of lotteries," amounting to $322,256.81, whereas it is necessary to deduct $45,279.74, which belonged to Hamilton College, and $17,000 thereafter paid said College, making $62,279.74; and $33,971.58 which belonged to the College of Physicians and Surgeons; $4,529.30 which belonged to the Asbury African Church; and $12,000 to the Historical Society, all of which sums, amounting to $112,780.62, require to be deducted before the amount belonging to Union College could be shown.

SCHEDULE II

Containing a statement of permanent investments, *not for revenue*, in real estate, now held by Union College.

Buildings.

Three college edifices for the accommodation of students, including six officers dwellings, the chemical laboratory, three society halls, college library room, and rooms for three society libraries.

Two edifices containing philosophical hall, chapel, theological hall, and three lecture rooms.

An edifice containing the geological hall and museum.

Two edifices, containing each accommodation for a family, a hall for boarding students, and additional study and lodging rooms, together with the sites, yards and outhouses, belonging to these respective buildings.

Grounds.

Four gardens in connection with the officer's houses, containing over five acres.

An ornamental and botanical garden of over four acres, for the use of students in the study of botany, and of the professor of botany.

Extensive groves, and walks and ornamental grounds, for the use of students in exercise and recreation, and also for a college cemetery.

Two hundred and thirty-five acres of land in immediate connexion with the college edifices, a portion of which is intended for the use of such students as wish to cultivate small pieces thereof; and a portion of which, (63 acres,) is appropriated to the boarding halls for the purpose of diminishing the price of board to indigent students; and a portion which (about 93 acres) is appropriated to experimental husbandry, under the direction of a professor of agricultural chemistry intended to be appointed, and for which the same is in a state of preparation.

These grounds when purchased, were all, to a great extent, without fences, and intersected by deep ravines, and presented, as a whole, a surface of great irregularity and rudeness, and have at great expense been fenced, levelled underdrained, planted, &c., and are now among the most beautiful grounds in this or any other country.

Also a site for an observatory, connected with about forty acres of additional grounds, and a dwelling house : through which grounds a living stream of water flows sufficient for affording instruction in hydraulic operations, and from which, by means of a water ram, water is already conveyed to the college premises. On these grounds it is in contemplation to erect an observatory, and establish a professor of astronomy in connection therewith, under the new arrangement in contemplation by the trustees.

Which buildings, gardens, grounds, &c., &c., amounting to about two hundred and eighty acres, lying in immediate connexion with said buildings, and adjoining the compact part of the city, have cost (irrespective of interest) $296,485.31.

Note.—The only exchange of property permanently invested in real estate, has been already reported to and approved by the Legislature, as will be seen by referring to the journal of the Assembly for 1814, pages 113 and 117.

SCHEDULE III.

Containing a statement of permanent investments, not for revenue, in personal property.

Classical and college library, and philosophical and chemical apparatus, at cost, irrespective of interest, ...	$32,817 39
Also furniture in recitation rooms, &c., &c., horses, wagons, harness &c., and farming implements, mechanics tools, &c.,&c., estimated at,.....	2,000 00
	$34,817 39

SCHEDULE IV.

Containing a statement of the investment (for revenue) of the permanent fund of forty-three thousand five hundred and eighty three dollars and 95 cents, the avails of a grant for the support of President and Professors, by the act of March 7th, 1800, concerning which no report is required by the law, which investments are as follows, viz.:

In the bond and mortgage of Zenas Clapp & Lyman Clary,	$8,173	54
Owen Cotton,.....	171	68
Daniel Joslin,.....	1,000	00
Elias Allen, ...	344	34
Russel Warren,.....	94	85
William Wood,.....	470	15
Nathan Gates, ...	305	07
John C. Mattice, ...	209	31
Justus H. Barnes,.....	522	15
Elijah Jucket,.....	355	00
Jonathan Hagadorn,.....	150	00
Andrew Gregg, ...	162	00
Harmanus Minklaer, ...	500	00
Henry Edwards,.....	825	00
John T. Vischer, ...	93	75
Cornelius Vielie, ...	400	00
Robert Leavitt, ...	603	38
John Bt. Van Eps, ...	260	00
Chatfield Fenn, ...	500	00
Philip R. Toll,.....	109	75
David Pruim, ...	590	06
Abijah Freeman, ...	350	00
Margaret Cooper, ...	3,500	00
H. C. Billings & W. B. Van Vorst,.....	3,000	00
Philo Stevens, ...	2,800	00
Thomas Armstrong, two,....	746	71
Isaac Q. Leake, ...	750	00
Willliam D. Ross, ...	5,000	00
Lewis Benedict,.....	4,000	00

In the bond & mortgage of	James C. Van Dyke,.....	4,108 66
	Moses Beal, ...	1,725 48
	Jonathan Pearson,.....	112 50
	Joseph Y. Peek, ...	640 00
	Samuel and Mary Smith,....	1,000 00
		$43,573 38

Note.—The above fund for the support of the President and Professors, in conformity to the act of March 7, 1800, instituting the same, was, as appears from the books, progressively and fully invested as the lands were sold, in the bonds and mortgages arising therefrom, and said investment it is believed has remained unchanged, otherwise than by the substitution of other bonds and mortgages in place of those originally taken, when any of the same have been paid off.

SCHEDULE V.

Containing a statement of the investment (for revenue) of the permanent fund of thirty-five thousand dollars for the support of Professors, granted by the act of March 30th, 1805, the same to be reported to the Legislature as follows:

1750 shares of $10 each in the capital stock of the Mohawk Bank,.....	$17,500 00

Being less than the amount of the above grant by $17,500, the same being the amount which has for many years also been invested in the stock of the Mohawk Bank; which amount of stock has recently been withdrawn, and the avails thereof applied to the payment of debts, or transferred to the inventory of disposable property below, and an equal am't. of stock in other banks substituted as investments in the place of the stock so withdrawn, as follows:

420 shares of $28 each in the New-York State Bank,	11,760 00
131 shares of $40 and $50 each in the Farmer's Bank of Troy, ...	5,910 00
	$35,170 00

Note.—No part of the above fund of thirty-five thousand dollars, instituted by the act of March 30, 1805, for the support of Professors, was ever invested under said act, because no part of said fund was received until long after the passage of the act of Feb. 22d, 1811, "authorizing the Trustees of Union College to invest monies previously granted by this State in the capital stock of the Mohawk Bank." Under this act this fund was fully and duly invested as soon as received, and the fact that it was so invested was duly reported by the trustees in their report to the Legislature for the year 1812, after which it has been reported as continued to be invested according to law. This investment as appears from the books, remained unchanged till the year 1847, when $17,500 of the stock of the Mohawk Bank, was, in conformity to the act of April 25, 1831, "in relation to the funds of Union College" withdrawn, and other stocks of an equal amount as above stated were substituted in the place thereof.

SCHEDULE VI.

Containing a statement of the investment (for revenue) of the permanent fund of fifty thousand dollars granted by the Act of April 13th, 1814, for the assistance of indigent students, the same to be reported to the Regents, viz:

1390 shares in stock of		Mohawk Bank, at $10 each,.	13,900 00
17	"	Manhattan Co., 50 "	850 00
In bond and mortgage of		Yates & McIntyre,.....	17,425 92
"	"	Peter Banker,.....	4,450 00
"	"	Jonathan Pearson, ...	1,000 00
"	"	J. Js. Van Eps & Brother,..	970 00
			$38,595 92

Being less than the amount of the above grant by about $11,395; the same having been invested in the stock of the Mohawk Bank, which amount is now withdrawn, and an equal amount of bonds and mortgages substituted as investments in the place of the stock so withdrawn, as follows:			
In the bond and mortgage of		Alexander B. Shankland	4,000 00
"	"	Abraham Kenneda, ...	400 00
"	"	Jabez D. Hammond, ...	3,000 00
"	"	John J. Van Schaick, ..	1,150 00
"	"	James Slater, ...	2,500 00
"	"	Robert Cunningham,...	360 00
			$50,005 92

Note.—As successive portions of the above fund of fifty thousand dollars, granted by the Act of April 13th, 1814, for the aid of indigent students, were received, the same were, as appears from the books, invested in the capital stock of the Mohawk bank, and these investments were continued until said investment amounted to $22,795, and the residue was invested in bonds and mortgages; and in so far as appears from the books or is known to the undersigned, said investment remained unchanged, otherwise than by the substitution, when any bonds and mortgages were paid off, of other bonds and mortgages of an equal amount in the place thereof, until the year 1846, when $11,395 of said Mohawk bank stock was withdrawn, and bonds and mortgages equal in amount, as above stated, substituted in its place.

It may be proper here to state, that it must not be understood, that the investments of these several funds have always been kept inviolably separate, and that as any bond and mortgage in any one has been paid off, another of precisely the same amount has simultaneously been substituted in its place; this would be impossible in practice, because impossible on the payment of bonds and mortgages in different funds, to supply without great delay, and unnecessary loss of interest, the place of each several separate bond so paid, by others of precisely the same several separate amounts. Still, care has been taken that the whole amount of bonds and mortgages and bank stocks possessed, and held sacred as an investment for these several permanent funds, should always exceed in amount, the amount of said funds collectively.

SCHEDULE VII.

Containing a statement of additional investments in real and personal property, remaining at the disposal of the trustees, as may be from time to time deemed proper, invested as follows:

Set apart by the trustees for the benefit of the classical library, and as a charity fund.

In the bond and mortgage of John Robinson,	$1,000 00	
Luke Blair,....	873 70	
contract of Russel Rodgers,	1,100 00	
William House,	1,161 00	
bond of H.N. VanPatten,	258 00	
Shelburn Ives,..	99 37	
Benjamin Nott,.	3,400 00	
note of John Austin Yates	1,170 69	
Isaac Riggs,...	975 00	
		$10,037 76

Intended for the erection of an Observatory.

In the stock of the Mohawk Bank, 200 shares of $10, each,.....	$2,000 00	
bond of Hezekiah Bradford,.....	20,000 00	
		$22,000 00

Remaining for the payment of debts and contingent expenses.

235 city lots, lying chiefly on Union, Fonda, Romeyn, Bridge, and State streets, on four of which, dwelling houses have been erected. The whole are estimated at $41,125, being an average of $175, per lot, many of them however, were purchased at a much higher price, and they are now selling at a higher price, (from $300 to $400,) but as it will be a number of years before they will all be sold, it is assumed that $175, would be a fair average estimation of the whole,..... $41,125 00

In the stock of the Bank of Albany, 520 shares of $30, each,.....	15,600 00	

In the stock of the Schenectady Bank, 50 shares of $10, each,.....		500 00	
In the stock of the Schenectady Steam mills, 10 shares of $100, each,.....		1,000 00	
In the stock of the Schenectady Locomotive Manufac'y, 10 shares of $100, each,		1,000 00	
In the stock of the Schenectady Marble and Cement Co., 10 shares of $50, each,		500 00	
Bond and mortgage of	Russell Rodgers,...	300 00	
	Patrick Gallagher,..	150 00	
	W. & J. Dormady,..	290 00	
	John Carr,.....	20 00	
	Patrick McKinney,..	265 00	
Contract of	Adam Tinklepaugh,.	400 00	
	George H. Campbell,	951 25	
	Christian H Brooks,	379 20	
	Patrick Costello,....	315 00	
	James Harbison,....	600 00	
	Richard Sturdy, ...	251 00	
	William McNeven,..	40 00	
	Teunis Rulapaugh,..	243 20	
Bond of	Nich. H. Van Patten,	110 00	
	Thomas B. Stillman,	258 93	
Lease of	James G. Foster, & Co	1,000 00	
Note of	D. D. Campbell, & others,.....	1,000 00	
	Thomas Wing,.....	100 00	
Bonds and notes taken from graduates for advances made to enable them to complete their education,.....		18,366 86	
Book accounts against graduates for similar advances,.....		25,082 47	
Interest due on investments for revenue, March 24, 1849,.....		2,402 89	
			112,250 80
			$144,288 56

Note to Schedule VII.

The exchanges which have taken place in the disposable property of Union College, real and personal, during the last twenty-five years,

have been so constant and numerous, that to report the same in detail would require the transcribing of no inconsiderable part of several volumes. It is presumed that an account of these every day transactions forms no part of the information desired by the resolutions transmitted to the trustees, and that were it given it would be as uninteresting to the Assembly as it would be laborious to compile and compare the same.

On the aforesaid indebtedness of indigent students, and students in straitened circumstances, whether for advances included among the notes or the book accounts stated above, interest is seldom required; those who become able and willing, pay; with those who do not, it is otherwise; and as these claims of the College against those who have been assisted in acquiring their education, are seldom enforced by law, it is reasonable to calculate that a large amount of this existing indebtedness, if ever cancelled, will be gratuitously cancelled, as many previous indebtednesses have been.

SCHEDULE VIII.

Containing a statement of the losses incurred by Union College, irrespective of interest.

By the failure of the Franklin Bank,.....		$10,000 00
" " Hudson Bank, ...		5,000 00
" " N. Y. Poudrette Co.,.....		2,300 00
" " Schen'y Waterworks and Sacan-		
" " daga Turnpike Co.,.....		675 00
" " individuals under the Bankrupt Act,		
and otherwise,.....		33,871 61
By a loss on U. S. stock sold in 1816, stated at.....		2,300 00
		$54,146 61

SCHEDULE IX.

Containing a statement of the debts owed by Union College.

To the Comptroller of State, irrespective of interest,.		$13,036 16
Peter Rowe, Esq.,	"	6,000 00
Andrew Truax, Esq.,	"	3,000 00
heirs of Nancy Van Guysling,	"	1,525 24
the Schenectady Bank,	"	1,000 00
the Mohawk Bank,	"	5,114 11
		$29,675 51

SUMMARY OF THE FOREGOING

AMOUNTS RECEIVED.

Schedule I.	Total amount of State grants irrespective of interest,.....	$331,612 13

AMOUNTS INVESTED.

Schedule II.	In buildings and grounds, irrespective of interest,	$296,485 31	
Schedule III.	In Library and apparatus irrespective of interest,	34,817 39	
Schedule IV.	For support of President and Professors under act of March 7, 1800,	43,573 38	
Schedule V.	For support of Professors under act of March 30, 1805, ...	35,170 00	
Schedule VI.	For aiding indigent students under act of April 13, 1814, ...	50,005 92	

Schedule VII. At the disposal of trustees,	144,288 56	
Total investment exclusive of losses,		$604,340 56
Schedule VIII. Amount of losses incurred,	54,146 61	
Total investment including losses,		$658,487 17
Schedule IX. Amount of debts,.....	29,675 51	
		$628,811 66
Excess of investment over amounts received and debts,		$297,199 53

From the foregoing statements it will be seen in what the *entire property* of Union College at present consists, and how it is invested.

From the following exhibit of the condition of the several permanent fund accounts it will be seen how all the grants of the state "not for revenue" have been appropriated, and how all the grants "for revenue" have been invested; and how the avails of each have been applied: which several accounts are as follows:

1. The buildings and grounds account.
2. The library and apparatus account.
3. The President and Professors account.
4. The indigent students' account.

EXHIBIT 1.

Buildings and Grounds.

		DR.
1796.	To amount granted by act of April 11th,.....	$10,000 00
1800.	To amount granted by act of March 7th,.....	10,000 00
1805.	To amount granted by act of March 30th,....	35,000 00
1814.	To amount granted by act of April 13th,.....	100,000 00
	To amount to balance, ...	141,485 31
		$296,485 31

		CR.
1806.	By amount expended on old college building and site,	$66,618 92
1823.	By amount expended on new college buildings and site to date,	96,461 69
1837.	By amount invested in West College building and site,	10,000 00
1848.	By additional expenditures to July 1, on new college building and site,	123,404 70
		$296,485 31
	By excess of expenditure by the trustees, over amounts received from the State,	$141,485 31

EXHIBIT 2.

Library and Apparatus.

		DR.
1795.	To amount of grant under the act of April 9th,	$3,750 00
1814.	To amount of grant under act of April 13th,	20,000 00
	To amount to balance,	9,067 39
		$32,817 39

		CR.
1848.	By amount expended to July 1, for purchase of books and apparatus,	$25,179 02
	By balance brought from account with classical library,	7,638 37
		$32,817 39
	By excess of expenditure by the trustees, over amount received from the State,	$9,067 39

EXHIBIT 3.

President and Professors under the act of March 7, 1800, and act of March 30, 1805.

				Dr.
		1. *Under act of* 1805.		
1823	To dividend received on Mohawk Bank stock to date as per Treasurer's statement,....			$19,600 00
1824	6 per cent dividend Mohawk Bank, ...			2,100 00
1825		do	.....	2,100 00
1826		do	.....	2,100 00
1827		do	.....	2,100 00
1828		do	.....	2,100 00
1829		do	.....	2,100 00
1830	2½	do	.....	875 00
1831	6	do	.....	2,100 00
1832		do	.....	2,100 00
1833		do	.....	2,100 00
1834		do	.....	2,100 00
1835		do	.....	2,100 00
1836		do	.....	2,100 00
1837	3	do	.....	1,050 00
1838	9	do	.....	3,150 00
1839	7	do	.....	2,450 00
1840	7	do	.....	2,450 00
1841	7	do	.....	2,450 00
1842	5	do	.....	1,750 00
1843	4½	do	.....	1,575 00
1844	5	do	.....	1,750 00
1845		do	.....	1,750 00
1846		do	.....	1,750 00
1847	6 per cent on bond and mortgage in part,..			2.100 00
1848	6	do	..	2,100 00
		2. *Under act of* 1800.		
1848				
July 1.	To interest received under act of 1800 on the sale of 10 military lots granted,.....			109,669 72
	Amount to balance carried forward,.....			258,101 54
				$437,771 26

		Cr.
1823	By amount paid to president and professors to date as per treasurer's statement, ...	128,026 36
1824	By amount paid president and professors, ...	8,775 50
1825	do	6,862 00
1826	do	9,078 60
1827	do	14,419 83
1828	do	4,099 50
1329	do	8,819 66
1830	do	9,323 33
1831	do	12,766 64
1832	do	13,085 99
1833	do	13,841 16
1834	do	13,509 98
1835	do	13,276 98
1836	do	16,310 48
1837	do	14,578 48
1838	do	15,000 31
1839	do	15,212 08
1840	do	12,315 94
1841	do	16,193 32
1842	do	16,325 37
1843	do	12,715 72
1844	do	14,257 76
1845	do	13,227 95
1846	do	14,579 38
1847	do	10,931 64
1848	do	10,237 50
		$437,771 26
	By excess of expenditures by trustees over amount received from State, ...	$258,101 54

EXHIBIT 4.

Indigent Students under the act of April 13, 1814.

DR.

1823	To dividends and interest, received on grant of $50,000, as per report to legislature in that year		$15,311 61
1824	To dividend and interest received,		3,250 00
1825	do	do	3,250 00
1826	do	do	3,250 00
1827	do	do	3,250 00
1828	do	do	3,250 00
1829	do	do	3,250 00
1830	do	do	2,375 00
1831	do	do	3,250 00
1832	do	do	3,250 00
1833	do	do	3,250 00
1834	do	do	3,250 00
1835	do	do	3,250 00
1836	do	do	3,250 00
1837	do	do	2,500 00
1838	do	do	4,000 00
1839	do	do	3,500 00
1840	do	do	3,500 00
1841	do	do	3,500 00
1842	do	do	3,000 00
1843	do	do	2,875 00
1844	do	do	3,000 00
1845	do	do	3,000 00
1846	do	do	3,000 00
1847	do	do	3,222 00
1848	do	do	3,222 00
	Amount to balance,		16,875 82
			$111,881 43

CR.

1823	By amount expended for relief of indigent students, to date as reported to legislature,		$17,502 72
1823	By amount expended for relief,		2,885 62
1824	do	do	4,272 73
1825	do	do	2,658 30
1826	do	do	1,682 50
1827	do	do	3,062 00
1828	do	do	3,428 44
1829	do	do	2,246 97
1830	do	do	1,972 77
1831	do	do	3,034 94
1832	do	do	2,622 78
1833	do	do	2,622 78
1834	do	do	4,859 81
1835	do	do	5,011 15
1836	do	do	4,346 16
1837	do	do	4,871 24
1838	do	do	2,466 67
1839	do	do	3,816 38
1840	do	do	3,816 39
1841	do	do	3,006 00
1842	do	do	2,593 00
1843	do	do	2,764 00
1844	do	do	3,146 00
1845	do	do	3,315 00
1846	do	do	3,335 00
1847	do	do	3,802 13
1848	do	do	4,165 63
	Balance brought from account with indigent students, instituted by trustees,		8,576 32
			$111,881 43
	By excess of expenditure by trustees over amount received from state,		16,875 82

Trustees of Union College in account for Classical Library.

		DR.
1823.	To income from the investment of the residue granted by the State by the 10th sec. of the Act of March 30th, 1805, as received to this date, ...	
1849.	To income as aforesaid to this date, ...	
	To amount to balance, ...	$7,638 37
		$7,638 37
	To amount transferred to library and apparatus account, ...	$7,638 37
		CR.
1823.	By amount expended for books to this date as per report to Legislature, ...	5,638 37
1849.	By amount expended to this date as above, ...	2,000 00
		$7,638 37
	By excess of expenditure by trustees over amt. received from State, ...	$7,638 37

Trustees of Union College in account vs. indigent students fund.

		DR.
1823.	To income from the investment of the residue granted by the State by the 10th section of the Act of Mar. 30, 1805, as received to this date, ...	
1849.	To income as aforesaid to this date, ...	
	To amount to balance, ...	8,576 32
		$8,576 32
	To amount transferred to indigent students ac.,	$8,576 32

CR.

1823.	By amount expended for the relief of indigent students as per report to Legislature,.....	8,576 32
1849.	By amount expended to this date as above (included in previous account with indigent stud'ts)	
		$8,576 32
	By excess of expenditure by trustees over am't rec'd from State, ...	$8,576 32

Note.—Although the trustees of Union College are fully credited on one side in the two last preceding accounts, for all the money they have from time to time advanced in establishing a classical library, (from which indigent students have hitherto received books gratis) and for aiding indigent youth; they are not made debtors on the other side for any income arising from the investment of any residue granted by the State by the 10th section of the aforesaid act of March 30, 1805, or otherwise; and the reason why they are not, is because no such residue was ever received, or ever existed for investment; and the fact that there did not any such residue exist, and the reason why there did not, will be seen by referring to the grants enumerated in a memorandum presented by a committee of the Legislature: see Journals of the Assembly for 1814, page 118, and also for 1823, pages 1006 and 1007, where the subject is more fully explained.

The facts of the case in relation to this grant were as follows:

Union College petitioned for a grant of forty-five thousand dollars only. But the lottery by which it was proposed to raise the same, could not probably be commenced under four years, (see 5th section of the act of March 30, 1805;) and it was estimated that the lottery to be granted might be drawn in four years more. To provide for the interest on $45,000 for eight years, would require the sum to be provided for to be increased to $70,000; but as it might take even more than eight years, to provide for that contingency, ten thousand dollars were added, making the entire amount $80,000. If the drawings were not successful, the additional ten thousand dollars would be swallowed up in providing for the interest; if successful, more than $45,000 with interest thereon, might be provided for, and a larger surplus than ten thousand dollars remain. Hence, $35,000 was absolutely directed to be invested for Professors; $35,000 allowed to be

appropriated to buildings; and the surplus, if any, be the same more or less, was to be invested as the 10th section of the act directs. Such, however, was the delay in drawing this Lottery, that the first moneys arising therefrom, were, as appears from the Comptroller's report for 1812, paid into the Treasury of the State for moneys loaned to Union College by a law passed 1806. (See Journals of Assembly for 1823, pages 1007 and 1008.)

Passing over the ordinary business transactions about which there could be no debate, the undersigned has endeavored to give in his report, a condensed and yet clear and comprehensive view of every thing material to the forming of a correct opinion on all the different subjects concerning which information was required; and if his report is not after all, as ample in its details, as the Assembly desires, he he can only say, that it is as ample as he has been able to make it in the short time allowed therefor; and this he trusts will be believed when it is considered that the same has been compiled from multifarious transactions, scattered through so many volumes, relating to things of so many year's standing, and concerning most of which the undersigned had but little previous acquaintance; and this for the reason that the books, from which the above statements are taken, have been kept by himself only nine years, beyond which his personal knowledge does not extend, during which the accounts contained in said books have been annually examined by a committee to which the Comptroller has usually belonged, and the same have been found to be correct, as will be seen by the recorded certificates of said committees.

The foregoing report having been prepared by the undersigned, (and the Board of Trustees not being in session,) the same has been by him submitted to the Finance Committee, approved, and directed to be forwarded to the Assembly.

All which is respectfully submitted.

ALEX. HOLLAND, *Treasurer.*

Union College, April 4, 1849.

SUPPLEMENT.

After the reading and approval of the above report, by the Financial Committee, it was stated by a member of said committee, that it being generally understood that the fiscal concerns of Union College had been subjected for a length of time to the supervision of the President, and it might be inferred by the comprehensiveness and speciality of the resolutions of the Assembly, that they were framed with a view to the obtaining a statement, not only of the ordinary transactions, but also of the special trusts with which the President had been charged ; and the report might not be deemed satisfactory, if no notice was taken of the same.

In conformity to the above suggestion, the following supplement has been prepared, verified and approved, and is submitted in connexion with the preceding statements, as forming an entire report, which supplement is in the words following, to wit :

In so far as the aforesaid statements relate to transactions, subsequent to 1804, when the President entered on the duties of his office, and previous to 1839, when the undersigned was appointed treasurer, the same are made out from books annually examined by an auditing committee, and containing annual certificates of the correctness of the contained accounts ; from which it appears that for the greater part of this whole period, the more important fiscal transactions of Union College, have been very much under the direction of the President, and that for the last twenty-five years he has been explicitly and fully charged with the supervision of the same, by the recorded resolutions of the board. In conformity to said resolution, the President has exercised a general supervision of the fiscal concerns of the college, and though he has not himself held and applied the funds, he has usually advised or directed the undersigned with reference to their application. The means of finding with what effect they have been so applied during the last nine years, are believed, without any further detail, to be fully furnished in the foregoing schedules.

In what manner and with what results the fiscal trusts reposed in the President had been previously exercised, has been easily ascertained, the same being matter of record in the books of the previous treasurers, which books, (irrespective of the days spent in behalf of the ex-officio, Trustees, by the Comptroller and Secretary of State, the Hon. Silas Wright, and the Hon. John A. Dix, in examining the same when passing out of the hands of Henry Yates into the hands of Jonas Holland,) have on two occasions been subjected to a special and searching examination, in so far as the fiscal transactions of the President are concerned.

The recorded reports of the Hon. Silas Wright, and Wm. James, Esq., on the former occasion, made in 1831, contain an explicit attestation to the fidelity, disinterestedness and success with which the fiscal affairs of the college had been conducted by the President under the plenary powers granted to him, and, having stated the fact, notwithstanding there had been expended on benevolent objects an amount exceeding legislative requirements, and notwithstanding a great amount of losses in stocks and otherwise had occurred, there still remained in the hands of the trustees, an excess of property over all the grants made, amounting to more than one hundred thousand dollars. This excess the examiners attribute to the ability with which the fiscal concerns of the college have been conducted, and the liberality of those conducting the same.

Did the undersigned feel himself called on in making out this report, to assign a reason why the excess of property in the hands of the trustees over all grants made, (then amounting to more than one hundred thousand dollars,) now amounts to more than two hundred and forty thousand dollars, he could only do so by repeating the reason assigned in the above recorded report, made on the former examination.

The recorded report on the latter examination, by Governor Marcy, the Hon. Silas Wright, and the Hon. John. P. Cushman, contains the same attestation to the fidelity, and ability and success, with which said fiscal transactions have been conducted by the President, under the trusts committed to him not only, but also recommends, for the reasons stated, the continuance of those trusts: from the conclusion of which latter report, made in 1834, the subjoined extract is taken.

"That the President has furnished extensive means, performed important services, and run great personal hazards, and this evidently without any sinister motive, without the design of personal gain, but for the purpose of securing and advancing the interests of Union College, or some kindred institution connected therewith. That the course of the President throughout all the novel and difficult emergencies which have occurred in conducting this whole business has been marked by firmness, sagacity, and disinterested zeal for the interests of the college, and of education.

That the full powers with which he was invested by the trustees, have been exercised with wisdom and success, and from the information they have received of his views in relation to this whole subject, your committee are of the opinion that the interests of the college, and of science, require that these plenary powers should be continued."

Finally, in view of the total net avails of all the grants made to Union College, amounting (irrespective of interest) to $331,612.13, and the total value of all the property, real and personal, now possessed by said College, estimated at cost, and amounting, irrespective of interest, to $604,340.56.

In view of the fact that there has been expended by the trustees, (not for revenue,) in buildings, gardens, ornamental grounds and experimental farming grounds, $141,485.31 more than has been granted by the State for that purpose; that there has been laid out for library and apparatus $9,067.39 more than has been granted for that purpose.

In view of the fact that the $43,483.93, the $35,000, and the $50,000, granted for permanent investment (for revenue) in bonds and mortgages and bank stock, the two former for the support of officers of instruction, and the last for the assistance of indigent youth, amounting in all to $128,483.93, have been and still continue so invested; and the fact that $258,101.54 more has been expended in the support of officers of instruction than has been received from the entire avails of the said funds granted by the State for that purpose; that there has (irrespective of $43,449.33, advanced to indigent students to assist them in obtaining an education, no considerable part of which will probably ever be repaid,) been gratuitously bestowed on

them by the trustees, an additional amount of $16,875.82 more than has been received from the grants of the State for that purpose, an excess amounting in all to $425,530.06. In view of the fact that one thousand eight hundred and fifty-nine young men, (as will appear from the annual reports heretofore made,) who must otherwise have been excluded from the advantages of a public education, have, by the joint aid of the State and the trustees, been furnished with the same, among whom are some of the brightest ornaments that adorn the different professions in the State. In view of these facts, and the further fact that the debts now owed by the College are $24,471.10 less than the losses hitherto sustained. In view of these facts, and when it is considered that after paying said debts the trustees will still have remaining at their disposal $10,000 for the assistance of indigent young men, $22,000 for the erection of an observatory, and $82,575.30 for meeting other contingent claims of science; when these things are considered, it is trusted that whatever unintentional informality or deficiency may have sometimes been in their reports, that it will still appear, both to the Legislature and to the public, (as it has always heretofore on examination appeared,) that the grants made to Union College have been managed with commendable care, and to say the least, that those to whom the management of the same have been entrusted have not proved themselves altogether incompetent or unprofitable servants.

The foregoing accounts have already been, by a disinterested accountant, examined and verified by comparing the same with the books from which they have been made; and the treasurer will be most happy as he is assured the president of College will also be, to have the same again personally verified, as their former statements have been more than once, by the Comptroller and Secretary or some of the other officers of State, acting as a committee from the ex officio trustees or by any other authorized committee, that will consent to take the trouble of conferring such an additional favor on the institution.

The undersigned has been directed by the president of the college to add that he was not aware that the trustees of Union College were required to report to the Legislature, concerning any other funds, than those granted by the act of March 30, 1805, and report was made of this investment, in 1812, when the same was invested; and it has as he supposes been reported every year that it remained so invested according to law. If however the manner of these annual re-

ports has been defective in either form or matter, the same has been unintentional, and will when known be cheerfully corrected.

Though aware that Academies and Colleges receiving annual allowances, were required to make annual reports concerning the application thereof, to the Regents, he was not aware that Union College, that receives no such allowance, was required by law to make any fiscal report to the Regents, except in relation to the grant made under the act of April 13, 1814, and if the college has been required by law to make any other fiscal report to the Regents, they have been ignorant of it; which is the reason why the reservation of rights has been appended to their more comprehensive fiscal reports. If this has been done in error, it is an error into which they were led by the advice of the Hon. G. A. Talcott, then Attorney General, and in which they were confirmed by the opinions of the late Chief Justice Spencer, the late Chancellor Kent, the late Justice Platt, Thomas Addis Emmett, John Wells and David B. Ogden, Esqrs., which opinions, together with the reply of the college to the Attorney General's report, which report will be found in the Ass. Jour. for 1824, Doc. No. 182, are herewith submitted. The time, however, has gone by in which, the dispute to which these opinions relate, excites any interest; the individuals concerned in it are it is believed with a single exception gone to their last account; and it is also believed that the trustees of Union College would prefer hereafter to make their annual report in full to the Regents, which they are now required by the act of March 30 1805, to make in part to the Legislature, and in part by the act of April 13, 1814 to the Regents, were a law passed authorizing them to do so.

All of which is respectfully submitted.

ALEX. HOLLAND.
Treasurer.

Union College, April 5, 1849.

City of Albany, ss.—Alexander Holland, Treasurer of Union College, being duly sworn, deposes and says, that the foregoing statement of the condition of Union College, as far forth as the facts therein stated in answer to the aforesaid resolutions of the House of Assembly

requires, are, according to the best of his knowledge and belief, just and true. ALEX. HOLLAND.

Subscribed and sworn to before me, this 5th day of April, 1849.
JAMES B. SANDERS,
Comm'r of Deeds.

City of Albany, ss.—Eliphalet Nott, President of Union College, being duly affirmed, saith, that although he has not either health or time to verify the foregoing statements presented by the Treasurer, by a comparison of the same with the books of the College, still, having heard the same read, and having been personally acquainted with and responsible for most of the important transactions contained therein, he is led from the known accuracy of the Treasurer, as well as from his own recollections, to believe the same to be correct and true.

ELIPH'T NOTT.

Affirmed to before me, this 5th day of April, 1849.
JAMES B. SANDERS,
Com'r of Deeds.

APPENDIX

To the Documentary Evidence, relative to the controversy between the Regents of the University, of the State of New-York, and the trustees of Union College, containing the opinion of the late Chief Justice Spencer, the late Mr. Justice Platt, Thomas Addis Emmet, John Wells, David B. Ogden, Esq'rs.; and also, the opinion of the late Chancellor Kent.

APPENDIX.

Opinion of the late Chief Justice Spencer.

I have considered the points in controversy, between the Regents of University and the trustees of Union College, and the whole case may be resolved into three questions:

1st. Whether the Regents possess, in the technical import of the terms, visitatorial powers, either at common law or under the statute, over Union College; and have, therefore, a right to require from the trustees an exposition of their financial concerns?

2d. What is the effect and operation of the last section of the act of the 30th of March, 1805, for the endowment of Union College, since the adoption of the amended constitution?

3d. Can the Legislature rightfully amend or repeal the clause of the act respecting Union College, passed during the last session of the Legislature, the trustees having filed their consent thereto in the Secretary's office?

I understand the Regents, in their communication to the Legislature, to contend that the act (2d R. L. 261) by fair interpretation gives them authority co-extensive with the known technical meaning of the term "visit" and "visitation," equivalent to the powers of general visitors at common law; but under qualifications and exceptions which, they seem to admit, withholds from them all power of interference in the concerns of the college, except the power of exacting from the trustees a report to them, of the state and situation of the revenues of the college; for they say, "they conceive their authority co-extensive with and equivalent to the powers of general visitors at common law, *except in so far* as these powers are restrained and qualified in regard to the election, appointment and removal of officers, the prescribing ordinances and statutes to the institutions which they incorporate, and in some other points of jurisdiction incident to the office of general visitor, which are specified in the act."

By the concession then of the Regents, their authority of visitors is reduced to very narrow limits indeed; they disclaim all the essential powers of visitors as at common law, insisting merely on that of requiring from the trustees a report of their financial concerns.

It is singular that a power so useless, from the want of other powers to enforce obedience or to apply remedies, if the trustees have abused their trusts, should be claimed, or become the subject of a grave complaint to the Legislature.

But I am clearly of opinion that the Regents of the University do not possess in any shape or sense, the authority they claim, or any other attribute of power, belonging to *visitors*, at common law, except in the single instance of appointing a president to the colleges and principals to the academies incorporated by them, in cases where the trustees leave those offices vacant for one whole year. To understand the questions on which my opinion has been asked, it is necessary to take a brief review of several statutes, and of the charters to King's, now Columbia College, and to Union College.

The Legislature, by an act of the 1st of May, 1784, for causes set forth in the recital, divested the governors of King's College in New-York, of all their estate real and personal; of all their corporate rights and powers, and of all authority vested in them by the charter of the 31st of October, 1754, to govern that institution, and vested all their estate and all their authority in the Regents of the University, who were constituted and appointed by that act; the Regents were by the same act vested with power to ordain and make ordinances and by-laws for the government of the several colleges which might compose this University, with power to appoint the presidents and all the officers thereof, to manage such estate as they might be invested with, to fix the salaries of the officers and to remove them from office; they were authorized to found schools and colleges and endow them, with the right to visit; and such schools and colleges were declared to be a part of the University, and as such, subject to the control and direction of the Regents.

It appears by the recitals contained in the charter to King's College, that it was endowed out of the avails of lotteries granted by the Legislature, and of a donation in land from the corporation of Trinity church in New-York; the persons named in this charter were incor-

porated as governors of the college; a right of succession was granted to them forever, with the usual powers of a corporation; and express powers were granted to them to appoint the president, professors, fellows and tutors, to fill all vacancies, to remove officers for misbehavior, to direct the course of study, and *make such laws, ordinances, and orders, for the better government of the college and students and ministers therein, as they might think best.*

The act of the 13th of April, 1787, repealed the act of the first of May, 1784, and it was under this statute that the Regents granted the charter to Union College. This act constituted a new board of Regents and entirely remodelled their powers; it ratified and confirmed the charter to the governors of King's College, changed the name to Columbia College; appointed trustees to the college, and vested in those trustees, all the property, and estate and powers which previously, and by the act of the 1st of May, 1784, had been vested in the Regents; and it also vested in the trustees, all the powers, rights and privileges which were granted to and vested in the governors of King's College by their charter, excepting such immaterial alterations as had become necessary in consequence of the change of government from a colony to a state.

The 7th section of this act of April 13th, 1787, provides that any citizens, or bodies corporate being minded to found a college, shall make known to the Regents, the place where, the plan on which, and the funds with which it is intended to found and provide for the same, and who are proposed as the first trustees; and if it shall appear to the Regents, that the plan and propositions are fully executed, they shall declare such college to be incorporated by such name as the founders signify and with such trustees as they shall name, not exceeding twenty-four nor less than ten; and *that such colleges should have perpetual succession and enjoy all the corporate rights and privileges enjoyed by Columbia College as therein after mentioned.*

The charter to Union College was granted by the Regents on the 25th day of February, 1795. It recites that an application had been made by Abraham Oothoudt and many others, stating that they were desirous to found a college in Schenectady; that they had made known the plan on which and the funds with which it was intended to found and provide for the college; that they had proposed persons as trustees, and signified that the name of the college should be Union Col-

lege—that the plan had been approved of, and that the funds intended by the applicants for the use of the college were as duly and sufficiently secured and vested as was requisite ; the Regents then declare the college founded and established ; that the trustees should be always twenty-four ; that they should have perpetual succession, be capable to sue and be sued, take and hold real and personal estate, with power to appoint a president, professors and tutors, to govern the students, prescribe the course of study, and *to make such rules, ordinances and orders for the better government of the college* and of the president and officers as the trustees should think best for the general good of the same, together with all the corporate rights and privileges which they were empowered to grant, and which are the same granted to Columbia College.

The claim of the Regents to be visitors, in the common law sense of the term, appears to be founded on the third section of the act (2d R. L. 261) which is in the same words as the 3d section of the act of 1787, (1 Greenleaf, 434) the provision is, "that it shall and may be lawful to and for the said Regents, and they are hereby authorised and required to *visit and inspect* all the colleges, academies and common schools, which are or may be established in this state ; *examine into the state and system of education and discipline therein, and make a yearly report thereof to the Legislature*—and also to visit every college in this state once a year by themselves, or by their committees, *and yearly to report the state of the same to the Legislature*, and to make such by-laws and ordinances, not inconsistent with the Constitution and laws of the State, as they may judge most expedient *for the accomplishment of the trust hereby reposed in them.*"

The first question which naturally presents itself is, who are, in the common law meaning of the term, *visitors* of Union College. And it seems to me that the Regents themselves have solved this question; for, adopting the law as laid down by judge Blackstone in his Commentaries, they say "that in eleemosynary corporations, which class includes colleges and all other incorporations for the purposes of education, the *founder* by virtue of his endowment, is of common right the legal visitor, to see that the property is rightly employed; but if he has appointed and assigned any other person to be visitor, then the person so appointed is invested with all the founder's power, and in every instance has authority to effectuate the intention of

the founder as far as he can collect it from the nature of the institution;" the Regents might have added, from the high authority of the same commentator, that the *fundatio perficiens* or the dotation of the funds, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder, and that it is in this sense that a man is called the founder of a college or hospital.

Who then were the founders of Union College, and as such became of common right the legal visitors? This question is answered by reference to the charter to Union College; Mr. Oothoudt and his associates are acknowledged, by that instrument, to have furnished the funds, to have invested and secured them for the express purpose of founding and providing for the college, and the college received no funds from the State, nor any promise of them, until after its incorporation.

Mr. Oothoudt and his associates being then the founders of the college, by making the first gift of its revenues, would be the legal visitors, had they not assigned their right, which it is perceived may be assigned. Their application to the Regents to be incorporated, their designation of twenty-four trustees, in whom were to be invested all the estate real and personal, given to the college, with power to direct and manage all its concerns, amounted to an absolute assignment of the rights of the first founders to any visitatorial powers, and these rights became vested in the trustees as a body corporate. If this proposition requires support, it will be found in the decision of the supreme court of the United States in the case of Dartmouth College *v.* Woodward. (4 Wheaton, 518.) I shall rely much upon that case in the course of this opinion. That case was most elaborately argued by learned and distinguished jurists; the opinions expressed by several of the judges discover great research, and in short they add to the high reputation and character which that court has uniformly maintained. I rely upon that case, as settling the law upon several of the points arising in this case; that court possesses jurisdiction in the last resort, in every case involving a construction of the constitution of the United States, when the decision in any court, whether of a State or of the United States, is adverse to the claim set up by any party under that constitution, their decision then upon any such case, becomes paramount and controlling upon all other courts.

That case shows that the charter to Dartmouth College, was granted upon an application to the crown, upon a statement that contributions had been made by private individuals for a charter for a religious and literary institution, the court adjudged that it was a private eleemosynary institution, a charity incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation, that the founders were represented by the corporation, who was the assignee of their rights, and stood in their places, that in every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest was in the trustees and could be asserted only by them; and that where a charter vests the usual power of government in trustees, they thereby become the visitors, and the founders retain no visitatorial powers, although the king be the founder.

It being then admitted by the Regents that the trustees of Union College, have all the essential powers of visitors, and it being established by the case just cited, that they possess the entire visitatorial powers, it seems to be claimed by the Regents, that nevertheless, they have under the act a portion of those powers, the right of demanding from the trustees an exposition to them of their financial concerns. In the call they have made upon the trustees, they require them, among other things, to report as to the application of the interest of $35,000, which in and by the act of the 30th of March, 1805, was directed to be applied solely and exclusively to the support of professorships in the college, and also as to the interest of $10,000 which by the same act was directed to be applied, one half in establishing and maintaining a classical library, and the other half towards defraying the expenses of indigent students, and how the principal sums were invested.

A visitatorial power which consists in the right to require an exhibition of the funds of a corporation, but without any authority to correct abuses, if any exist, is conceived to be an anomaly, it would require the most explicit language to constitute the right claimed, when it is considered that the funds with which the college was endowed, at first, were private benefactions, with which the public had no concern, and that there existed no pledge on the part of the public further to endow the college, or contribute towards its funds.

The object, extent and end of the authority conferred on the Regents by the third section of the statute, are well marked and defined; they are to *visit and inspect all the colleges, academies and schools, examine into the state and system of education and discipline therein, and make a yearly report thereof to the Legislature; and also to visit every college in this State once a year by themselves, or by their committees, and yearly to report the state of the same to the Legislature.* The object of visiting and inspecting, is for the purpose of examining into the state and system of education and discipline, without any power to alter or change either of them; and their whole corrective power consists in reporting to the Legislature The Regents lay great stress on the words "visit" and "visitation," as though these words necessarily imported visitatorial common law powers; but these words must not be insulated and construed without reference to the context; there we find the sense in which they are used; a local visitation and a personal examination into the state and system of education and discipline, with the sole view of informing the Legislature, whether they are good or bad. The Regents seem to think that their powers thus limited are so insignificant, that no one will seriously contend they are not more extensive.

It is believed not to be a legitimate deduction of power, to infer a larger power from a less one expressly given, because the possessor of the smaller power may think it insignificant. The Legislature were certainly of a different opinion, for in the 16th sec. of the act of 1787, we find them thus speaking, "and for the encouragement of such academies, and to render them more useful and respectable, the Regents of the University shall be visitors of such academies and the chancellor and vice-chancellor shall, as often as they see proper, visit such academies *to inquire into the state and progress of literature therein.*"

The Legislature thought, that visits from such respectable men as the Regents would have the effect to render these institutions more useful and respectable, by inciting the students to application, and by stimulating the instructors in their duty towards their pupils; and it is well known that nothing has a more salutary influence upon such institutions than periodical visits from highly distinguished literary men.

The act of the 30th March, 1805, requires the trustees annually to exhibit to the Legislature a true and circumstantial account of their proceedings, in relation to the disposition and application of the interest that should accrue from the sum of $35,000 directed to be placed at interest on landed security, or invested in public stock,* which interest was for ever thereafter to be applied exclusively to the support of professorships in the college. This act authorised the raising, by lotteries, of $80,000 for the use and benefit of the college, but required no report from the trustees as to any other part of the benefaction. It cannot, I think, be seriously asserted, when the *donors* require *no account* of the expenditure of the moneys given, that *any other persons* have a right to exact an account; much less can it be asserted, that when the *donors require an account* to be given to *them*, that any *other persons* have a right to intervene.

When the authority conferred on the Regents by the act of the 1st of May, 1784, is contrasted with the power given to them by the act of 1787, it must be evident that the Legislature intended materially to abridge and curtail their powers by the latter act.

That the Regents have no visitatorial powers of the nature claimed by them, may be inferred from the circumstance, that whatever jurisdiction was conferred, extended as well to schools and academies as to colleges; the Regents had no power given to them to incorporate schools, and *at that* period they were wholly private institutions, maintained at individual expense, and it will scarcely be insisted that the Regents had visitatorial powers over them in the common law sense. The Regents were authorised to incorporate academies, but the trustees of academies had, by the 14th section of the act, the sole and absolute control and management of them and of their revenues, excluding all pretence of claim on the part of the Regents to be *visitors* of these institutions in the sense now contended for. From all these considerations, I can have no doubt, that the Regents have no powers under the statute, as visitors in the common law sense; and that they have no authority to require from the trustees of Union College a report of their revenues or finances; and I am of the opinion that the trustees of Union College possess all the common law authority of visitors to that institution, except in the single particular of filling the presidency when improperly left vacant.

* This investment was, by a subsequent act, authorised to be made in the Mohawk Bank.

I answer, to the second question, that the last section of the act of the 30th of March, 1805, having declared that the grant of the lotteries was upon the express condition and stipulation, that the trustees of Union College should make application under their common seal, to the Regents, for an amendment of the charter of the college, so as to reduce the whole number of trustees to *twenty-one*, and so as to constitute the Chancellor, the Justices of the Supreme Court, the Secretary, the Comptroller, the Treasurer, the Attorney-General, and the Surveyor-General, for the time being, ex officio, trustees of the college, and so as that the Regents shall fill all vacancies of the trustees from time to time; and authorising the Regents, on such application, to amend the charter of the college accordingly; declaring also that the vacancies should not be filled till the number of trustees, exclusive of the officers of State, should be reduced *to ten;* and the trustees having made such application, and the charter having been amended accordingly, the *amended charter* became equally inviolable with the *one first granted.* It has been, however, violated by the reduction (under the amended Constitution) of the number of the Judges of the Supreme Court from *five* to *three*, which reduced the number of trustees from 21 to 19; and thus the college, without any agency or fault of theirs, has been deprived of a part of the trustees stipulated for in their amended charter, and a part of that description of trustees which, by stipulation, were to become and remain the majority.

In the case of Dartmouth College vs. Woodward, it was decided, that in private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest and completely representing the donors, for the purpose of executing the trust, had rights protected by the Constitution of the United States; and that the acts of the Legislature of New-Hampshire were repugnant to the Constitution. One of the acts thus pronounced to be repugnant to the Constitution, had increased the number of the trustees, which was limited by the charter to twelve. Chief Justice Marshall said, that there was no essential difference between acting directly and acting through the agency of trustees, and that the act, by increasing the number, operated a material change in the grant, and was subversive of the contract, on the faith of which the property was given. It makes no difference, in my opinion, that the number of the trustees were diminished instead of being increased, by the operation of the

amended Constitution ; nor did it in the opinion of the Judges of the Supreme Court, for Judge Washington, in the case referred to, said, "that if a law *increases or diminishes* the number of trustees, they are not the persons whom *the grantors* agreed should be the managers of the fund." The trustees of Union College surrendered, on specified conditions, their right under their *first charter* to fill vacancies in their board, and this right was to be transferred to the Regents, who, in process of time, and under said specified conditions, were to appoint all the trustees not so *ex officio;* but as the whole number of trustees had been reduced by the new Constitution to *nineteen*, instead of *twenty-one*, as stipulated for ; and as the *nine ex officio* trustees would become *a minority*, and the *ten* trustees appointed by the Regents would become *a majority*, the entire effective control over the concerns of the college would be taken from the State officers and placed in the hands of the trustees deriving their appointments from the Regents, contrary to the express stipulation of the amendment of the charter of 1805. This was *an essential* change of the compact, and as it would seem from the *guarded provisions* in the amended charter, contrary to *the interests* and the *intention* of the college. It is no answer to this to say, that it would make no difference to the college, or that by the operation of the amended Constitution, the injury is irremediable , the college have a right to say, that the compact *is broken*, that it is different from THAT on which they surrendered up the right of appointing their own trustees, and that now their concerns are put under the government of a different body of men.

Such being the effect produced by the amended Constitution, it will not, I presume, be said, that this case is distinguishable from that of Dartmouth College *v.* Woodward, because the charter was there altered by an act of the Legislature, and here, by a convention of delegates assembled to amend the Constitution.

If a convention can violate the Constitution of the United States, by impairing the obligation of contracts, or by an act of attainder, or an *ex post facto* provision, then indeed, an easy method exists, of abrogating and annulling the inviolability of contracts, and rendering the constitutional barrier a dead letter. If such a doctrine could be successfully maintained, the State authorities would easily triumph over the destruction of a most sacred and valuable provision in the national compact.

The 10th section of the first article of the Constitution of the United States provides that "no State shall pass any bill of attainder, or ex post facto law, or law impairing the obligation of contracts." A convention represents the sovereign authority of the State, as emanating immediately from the people; their acts are the acts of the State, and their acts are rules of conduct prescribed by the supreme power of the State, and this is the definition of municipal law. I cannot, therefore, entertain a doubt that the new Constitution, by reducing the number of the Judges of the Supreme Court, and thus changing the goverment of Union College into other hands, than those stipulated for, did subvert and impair their amended charter, contrary to the constitutional inhibition.

Whether the impaired charter subsisted and was binding on the college, is a question now merely speculative, since the proffer contained in the clause in the act of the last session, has been accepted. "*The trustees*, admitting or waiving the question of right, so far as the State officers are concerned, have merely *contended that the right of filling vacancies in their board had never yet vested in the Regents, and that the adoption of the new State Constitution had rendered it impossible that such right should ever invest.*" I should, however, strongly incline to the opinion that the college was fully restored to, and reinvested with its original charter; because the State had violated one of the conditions of the amended charter, and were incapable, without the consent of the college, of repairing the injury; and this being a violation, by one of the parties to a compact, of an essential part of it, without the fault or participation of the other party, such other party would be released from the observance of the condition which was an equivalent for the part thus violated; and these mutual stipulations, forming parts of the same contract, which was separable from the first charter, and the one party having absolved himself from the observance of his stipulation, the other party was also absolved; at all events, the State was bound in good faith, to apply a just remedy, and such a one as would be acceptable to the college; and this was done by the clause of the act of the last session.

This clause is contained in an act relative to the city of Schenectady; it is preceded by a recital, that by the existing charter of Union College, the Chancellor, the Judges of the Supreme Court, the Secretary, the Comptroller, the Surveyor-General, the Attorney General and the Treasurer, are ex officio trustees thereof, and that by reducing the

number of the justices of the supreme court, under the present constitution, the number of the trustees will be reduced; it is then enacted, that the Governor and Lieutenant Governor, for the time being, shall be added to the number of trustees *ex officio* already belonging thereto; the trustees not *ex officio* to be and remain the same in number as they at present exist in said board, and vacancies hereafter occurring therein, to be filled in the same manner as vacancies have been heretofore filled; provided the board of trustees of the college shall consent thereto, and file such consent in the office of the Secretary of State.

I perceive nothing ambiguous, as is suggested by the Regents, in this enactment: the only facts to be explained were, in what manner vacancies have been filled, and what was the then existing number of trustees. These inquiries would naturally suggest themselves upon the slightest consideration. If the Legislature did not know the state of these facts and did not see fit to make the inquiry, surely their neglect to inform themselves can afford neither ground to impeach the conduct of the trustees, or for amending or repealing the enactment, and I am of opinion that they cannot rightfully do either.

In the case of Dartmouth College *vs* Woodward, such a charter as the one granted to Union College was pronounced by the court to be a contract, made on valuable consideration, for the security and disposition of property within the letter and spirit of the constitution of the United States, and that its obligation could not be impaired without violating the constitution. In the case of Fletcher *vs.* Peck, 7 Cranch, 135, the supreme court of the United States also decided, "that when a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights." The Legislature have the same right to amend or repeal every act creating private corporations for the purpose of holding and managing property, such as charters to banks, and insurance companies, without the consent of such corporations, as they have to amend or repeal the clause of the act of the last session. The cases are not distinguishable; and I forbear to make a single comment upon the consequences of an attempt to exert such a power by the Legislature.

In the act of the 30th of March 1805, and in the clause of the act of the last session, which related to Union College, the Legislature have evinced their sense of the sacred and inviolable nature of such

charters: in both cases they have required the consent of the trustees prior to the enactments taking effect, and I must say, that the suggestion contained in the communication from the Regents to the Legislature, rather inviting to an amendment or repeal of the clause in the act of the last session, after the trustees had filed their consent to it, has excited in my mind no little surprise, considering the high source from which such a recommendation proceeded.

A. SPENCER.

Albany, May 8, 1823.

Upon mature deliberation, I fully concur in the above opinion.

JONAS PLATT.

Utica, 29th May, 1823.

Opinion to the Trustees of Union College, in their controversy with the Regents.

After mature reflection, we cannot hesitate to agree, in all essential points, with the opinion of the late chief justice, on the subjects in controversy between the Regents of the University and the trustees of Union College. Indeed it seems to us, that the greater part, if not the whole of that controversy is settled by the case of Dartmouth College, *vs.* Woodward, 4 Wheaton, 518, which as to the right of the Legislature to repeal the law of Feb. 7, 1823, is of indisputable and paramount authority, and as to the visitatorial powers of the trustees, is in strict conformity with the acknowledged English law on the subject. The charter of Dartmouth College, as set forth by Mr. Justice Story, (p. 677, 8, 9, 680) in its important points as to this controversy, very much resembles that of Union College, and when it has been decided that the charter of the former is a contract, the obligation of which cannot be impaired by a State law, it is impossible to escape from the conclusion, that the same principle is a protecting shield to the existing, as it would have been to the original charter of Union College. Previous to the incorporation of this college, the board of Regents were remodelled with all their present powers; by the 7th section of the act to which they owe their existence and authority, provision is made for incorporating eleemosynary colleges on private foundations. (2d vol. Kent & Radcliffe's ed. 236.) The mode there

indicated was pursued by the founders of Union College, and a charter was granted to the trustees named by the founders. By it they were to enjoy all the corporate rights and privileges enjoyed by Columbia College. Some of those are set forth in the very next section; one of which is that "no persons shall be trustees of the same in virtue of any offices, characters or descriptions whatever," and another is, by the charter of that college, that the trustees shall have the power to fill up the vacancies in their own body. These were among the terms upon which the original founders chose to endow Union College. Who then had a right to vary those fundamental terms? Clearly the Legislature had not; it could not by the utmost exercise of its authority, have made any persons trustees, *in virtue of any office, characters or descriptions whatever;* nor could it have reduced the number of trustees below 24, nor of those elected to ten, nor have taken from that body, or given to the Regents the power of filling up the vacancies that should happen after the elected trustees were reduced to ten. The Legislature very probably felt its own incompetency to do this and made it a matter of bargain and compact with the trustees, that *they* should apply to the Regents for such an alteration in their charter, which was done, and granted accordingly. The amended charter is then clearly a compact, and has every characteristic of such a contract as is protected by the constitution of the United States. That contract was violated by the adoption of the new constitution, for certainly *diminishing* the number and altering the proportions of the constituent parts of the board are as much breaches of the contract, as was increasing their number in the case of Dartmouth College. (See Judge Washington's opinion, 4th Wheaton, 662.) The Legislature considered the assent of the trustees necessary to the validity of the law by which the original charter was changed, and they judged rightly. By a compact made on valuable consideration, a *limited right* was thus acquired in derogation of the original charter, to make the Chancellor, the Justices of the Supreme Court, the Secretary, the Comptroller, the Treasurer, the Attorney-General and the Surveyor-General, ex officio trustees. But the compact proceeded no further, and with the exception of those specified officers, the original charter, as to the inhibition of ex officio trustees, remained in full force. Could, then, the Legislature, in despite of the positive provisions of that charter, "*that no person shall be trustees of the same in virtue of any offices, characters or descriptions whatever,*" by any exercise of its own auto rity, have made the Governor and Lieut. Governor ex officio trustees?

The case of Dartmouth College expressly answers in the negative. And if they could not do it in the first instance, how can they possibly accomplish it now, by any modifying or explanatory act not assented to by the trustees? As the Legislature could not remedy this defect by its own act, what was to be done? A new contract was to be made, and for the purpose of making it, a new consideration was to be given.

The trustees and the Legislature did not, perhaps, judge very erroneously, if they supposed (and it may have entered into their reflections) that the right of electing the trustees (and not merely ten, but twenty-four) had reverted to the board. The sentiments of Chief Justice Spencer so strongly concurring with what we also entertain on that point, it is not extravagant at least to say, that the question was very fit to be settled by compromise and arrangement. That was then effected by a new contract. The State retained what it had probably lost, the right of having eleven ex officio trustees, (two of them entitled only by the new contract) and it confirmed to the trustees a part, and only a part, of what they had probably regained, the right of electing and filling up vacancies of ten elective trustees.

The committee of the Regents, however, in their report, say that it was not the intention of the Legislature to restore that power to the trustees, and they vouch the private communications of several members of that body. We know of no power competent to institute an inquiry into that fact, or to act upon it if proved. The statute itself exhibits no proof of indiscreet and improvident legislation, but, when well considered, the very reverse; and by the filing the consent of the trustees pursuant to its provisions, the law, which was previously imperative, passed into a contract, which thereby became obligatory on both parties. It is then fully as important a consideration, as to the immutability of that contract, how the trustees understood it, as how the Legislature did. There is no allegation or pretence of mutual mistake; and certainly if it were a private contract, neither party could undo by his own act, nor could a court of equity effect it. As a contract made by the State, it is equally incapable of being changed by the State, without the consent of the other contracting party. In the case of Fletcher *vs.* Peck, 6 Cranch, 87, a law came under discussion, unquestionably improvident, and fully proved to have been procured by corruptiion. A subsequent Legislature of

Georgia, penetrated by a sense of the fraud and iniquity by which it was obtained, repealed it; but the supreme court of the United States considered that repeal a nullity; and Ch. J. Marshall says, (p. 135) "when, then, a law is in its nature a contract, when absolute rights have vested under that contract," (and they undoubtedly have vested in the trustees of Union College by the act of last session) "a repeal of the law cannot divest those rights."

This principle as well as the authority of the case of Dartmouth College, seems to us fully to justify the opinion we entertain, that the repeal or modification of the law of last session, without the consent of the trustees, or any explanatory act concerning it, without the same consent, would be unconstitutional and void, and perfect nullities.

The next question is as to the visitatorial powers claimed by the Regents over Union College. These powers are not supposed to depend on any particular provisions of the charter of that college; but to be derived from the third section of the act of the 13th April, 1787. If the Regents possess such powers over Union College, they possess them over every other college, every academy, and every incorporated school now in the State, or that may at any time hereafter be instituted within its limits. This is an authority of uncommon extent; and before it be allowed to any one body of men, it becomes a matter of public importance to inquire in what visitatorial power consists.

The visitors of every incorporated institution, are a domestic tribunal, possessing a jurisdiction from which there is no appeal to the regular courts of justice, or indeed to any constituted authority whatever. In order that we may not seem to overrate the law, we shall avail ourselves of the words of Ld. Holt, in his very elaborate opinion in the case of Philips *vs.* Bury, which is now universally allowed to contain all the doctrine on this point. It was first published in Skinner's Reports, (475) who was himself of counsel in the cause. We shall however cite it from D. & E. as that book is the most easily accessible.

Ld. Holt says, (2 D. & E. p. 349) "It is clear that where any one is visitor of a college, he has full and complete power *to deprive and remove any member of the college qua visitor.*" In p. 351 he says,

"The next point is no more than this—whether the justice of this sentence be examinable in any of the courts of common law? That is, first, whether the sufficiency of the sentence as to the cause, be examinable in the common law courts; and secondly, whether the truth of that cause, suppose it to be good and sufficient to ground the sentence, if true, can be inquired into and examined. *And I think the sufficiency of the sentence is never to be called in question, nor any inquiry to be made here into the reasons or causes of the deprivation. If the sentence be given by him that is visitor, created so by the founder, or by the law, you shall never inquire into the validity or ground of the sentence.*"

Again, in 353, in answer to the question "What is the visitor to do?" he says, "*He may expel and he may deprive.*" The only question there was, "who is visitor?" for it is "agreed on all hands that he may deprive. But you will say, the visitor hath no court, and it is unreasonable to conclude a man by the sentence of one that hath no court. It is (I say) not material whether he hath a court or no—all the matter is, whether he hath jurisdiction; *if he hath jurisdiction and cognizance of the matter and person, and he giveth sentence in the matter, his sentence must make a vacancy, be it never so erroneous; but there is no appeal, if the founder hath not thought fit to direct one. That an appeal lieth to the common law courts of England, is without precedent.*" Again, (p. 357) "It is by the constitution of the college, inseparably incident to their places that both head and members should submit to the visitation, and *contumacy is held a good cause of deprivation.*" "It was held a good cause in Bird & Smith's case and in the case of Allen *vs.* Nash, *quod fuit refractorius.*" Again, (p.358) "And contumacy, I take it, is a cause of forfeiture of his (the Rector's) office; being an offence against the very essence of his place, whereby he is made subject to the power of the visitor; and if he go about to evade, or contumaciously refuse to submit to his power and authority, it is an offence against the duty of his place, and a good cause of deprivation."

Here then is a ready opportunity for the exercise and the testing of the Regents' visitatorial powers. If they exist, as claimed, the trustees of Union College have been guilty of contumacy, and the Regents may amove them without the possibility of appeal to any tribunal in the land; and if they do not themselves possess the power of filling vacancies, they may at least enable the great officers of the

State to fill them in their discretion. That jurisdiction was indeed once possessed by their predecessors, under the act 1st May, 1784; at least as to the colleges that might compose the university, and no others appear to have been then contemplated, and it may, therefore, well have occurred to the jealous republicans and reflecting statesmen of that day, that the authority to remove, without appeal, the officers, tutors, heads and trustees of every seminary of learning in the country; of directing the studies; of controlling the education, and thus swaying the minds of the growing generation, *when vested in one body*, might, in times of trouble, make that body an irresistible agent of political power. They may have considered that although such a summary authority may be necessary for the well governing of literary incorporations, it should be broken up and divided among differently constituted bodies, which, from the incongruity of their origin and the diversity of their views, would be incapable of coalescing for any dangerous purpose; and if they presumed (what we have no doubt is the fact) that a single board of such power over the preceptors of youth and their education, would not be tolerated, even in the monarchial government of England, they very probably deemed it inconsistent with the genius and principles of our Republic. Be that as it may, for some reasons or other, they annulled the powers given by the act of 1784, and on the 13th April, 1787, remodeled the board of Regents, and as we think, with very different and much more limited authority.

The present Regents, indeed, contend it still exists, and is granted by the words (2 Kent & Radcliffe's ed. p. 235) "That it shall and may be lawful to and for the said Regents, and they are hereby authorized and required to visit and inspect all the colleges, academies or schools, which are or may be established in this State, examine into the state and system of education and discipline therein, and make a yearly report thereof to the Legislature; and also to visit every college in this State once a year, by themselves or by their committees, and yearly report the state of the same to the Legislature," and also by the provision in the 19th section of the same act, (p. 341) and the 17th section of the new revised law, (2 vol. p. 365) that when an academy shall be changed into a college, such college shall "be subject to the like rules, regulations, control and visitation of the Regents, as other colleges mentioned in this act." They say, "The words *visit* and *visitation*, contained in the above extracts, the

Regents have conceived to be used, not merely in their common acceptation, but being terms of known legal import and effect, to have been introduced into the statute with reference *to their* technical signification." If, as the Regents also say, "The framers and revisers of the act well knew that at common law, all corporations were liable, as a necessary incident to their creation and existence, to be *visited* in the technical acceptation of the term," &c. and therefore, that the words *visit* and *visitation* are to be considered as used in their technical signification, it would seem a necessary consequence from the same course of reasoning, that the framers and revisers of the act, and the Legislature itself only meant to apply those words where, by the common law they were entitled to apply them ; that they only meant to create visitors for such institutions, as by the common law, it belonged to the State to visit. Now that would necessarily exclude all eleemosynary corporations on private foundations, (and such Union College is admitted to be by the Regents themselves) because the visitation of them of common right belonged to the founders and their assignees.

Instead, therefore, of inferring so extensive a power from one or two sentences containing general and ambiguous words, a legislative enactment should be produced, of the most explicit and unequivocal character, to lead us to believe that it was intended to make so great a change in the common law, and so violent an infringement on the most ancient and immemorial rights of the private founders of charitable corporations, as to take away from them and their heirs, or those of their appointment, the power of visiting the charities they called into existence, for the purpose of vesting it exclusively, and in every instance, in a body appointed by the State. That, however, is the construction of the statute for which the Regents contend, and without which they can have no visitatorial power over Union Collage, or any other private eleemosynary corporation. Other reasons also lead us to the entire conviction, that the powers delegated by the 3d and alluded to in the 19th section of their own charter, are no more than actual visitings and inspection, as *commissioners*, for the purpose of reporting to, and informing the Legislature of the State of education and discipline in the different literary institutions throughout the State, and that with regard to colleges they should make such visit once a year. This personal visitation and inspection, the Regents seem to think, would be an intolerable grevience; and indeed usage and cour-

tesy appear to have substituted for it annual reports from the different colleges, though we are well convinced, that such was not the intention of the Legislature. It should however be remembered, that the due excersises of even the visitatorial powers they claim, would impose on them the same burthen; for *visitation* is always to be performed within the bosom of the corporation, and in the place of its corporate existence; except, perhaps, where the Lord Chancellor of England is ex officio visitor, and visits in his Court of Chancery. A visitor, may indeed, in any place, receive complaints, notify the accused, receive answers, and issue preparatory summonses and directions for an actual visitation; but the *forum domesticum* is to be held, and the jurisdiction exercised in the *home* of the corporation. That this inspection, as State commissioners, is all that those words contemplate, is, we think manifest from the accompanying expressions, which obviously qualify its exercise. If the Regnets were *general visitors*, why should they be specially *authorized and required* to examine into the state and system of education and discipline therein? If they were to be the final arbiters and judges, without appeal on this or any other matter of collegiate administration, why are they required to make a yearly report to the Legislature.

Independent, however, of all reasoning on the words of the 3d and 19th sections of their charter, we think there are abundant reasons for the opinion we entertain, that the Regents are not, and cannot be visitors of any eleemosynary college, on a private foundation. By the common law, they certainly are not and cannot be so, and whatever power they possess, with respect to such institutions, must be derived from the respective charters of those bodies, coupled perhaps with the express powers of their own charter. How far the Regents are or will be the visitors of any colleges they may found themselves, or establish under the authority and with the funds of the State, as the perficient founder, need not here be discussed, nor whether they are visitors of eleemosynary academies incorporated by virtue of that law. But if they possess any such power in the latter case, we hold it not to have been derived from any authority that the State or Legislature can give or could give, but in every instance by *the special appointment and request of the perficient founder.* The incorporation is to be granted on the application of the founders and benefactors, &c., by an instrument in writing under hands and seals, to the Regents of the University, expressing their request that such academy should be in-

corporated, and *be subject to the visitation of the Regents. Volenti non fit injuria*; and if they choose to request such a visitation, the surrender of their own right to visitation is voluntary, but is also the source of the Regents' power. It is, however, a remarkable difference, and in our minds affords room for very pregnant observations, that in the section relating to the incorporation of eleemosynary colleges on private foundations, no such request is stipulated for on the part of their founders, and therefore no such surrender of their common law rights required. They are only to make known in writing to the Regents, the place where, the plan on which, and the funds with which it is intended to found and provide for the same, and who are proposed as the first trustees. Whenever the plan and propositions of the founders are fully executed, the regents shall declare, by a corporate act, that the college shall forthwith become incorporated, and it shall thenceforth enjoy the corporate rights and privileges enjoyed by Columbia College.

It becomes, therefore, a matter of importance to enquire, what those rights and privileges are? Under the colonial government, the governors of Kings, now Columbia College, were in express terms made its visitors. The words of the charter are as follows: "And we do further will and grant, that the said governors of the said college for the time being, or the major part of any fifteen or more of them convened as aforesaid, shall have full power and lawful authority to visit, order, punish, place and displace the treasurer, clerk, steward, students and other officers and ministers of the said college, and to order, reform and redress all and any the disorders, misdemeanors and abuses in the persons aforesaid, or any of them, and to censure, suspend or deprive them, or any or either of them, so always that no visitation, act, or thing in or concerning the said college, be made or done by any other person or persons whatsoever, but as is herein before directed and and declared."

But in 1787, that board was abolished and a new one instituted; and (by section 10) "All and singular the power, authority, rights, privileges, franchises and immunities, so heretofore granted to and invested in the said *Governors of the College* of the province of New-York, in the city of New-York, in America, by the said charter, excepting (certain matters, not connected with this question,) were granted to and vested in the *trustees of Columbia College*, in the city

of New-York, and their successors forever," &c., thereby undoubtedly making those trustees the visitors of that college, and vesting no remnant of that power in the new body of Regents, except where the appointment of a president, in case of vacancy, has been too long delayed.

It seems to us perfectly clear, therefore, that the visitatorial power over Union, as well as Columbia College, was vested in its own trustees, and thus the immemorial rights of the founders are preserved, consistently with the common law, and an authority, very formidable if concentred in one body, very dangerous if exerted by it, and very useless if not called into activity, has been judiciously broken up, and distributed among small and separate bodies, each connected with a particular institution, incapable of endangering or deranging the general system, and not likely to let its powers remain improperly inactive.

The claim of the Regents to be the visitors of Union College, has been, for the present, made on the subject of its financial concerns; and it may with much force be said that the trustees cannot be visitors in this respect, as they are the immediate possessors and administrators of the fund. We accede to this position as good law; but we are equally clear that even in that respect, the Regents are not visitors of that College, and have no authority to inquire into or direct the disposition of its funds. Their own charter in giving a very limited authority to inspect and report, touches upon no such subject, and it is very remarkable, if the Legislature supposed the Regents to possess that power, that the exercise of it should not be left, without interference, to that body, which would have a right to decide respecting it without appeal, and would possess exclusive jurisdiction on the subject matter. But on the contrary, the act of 1805, expressly provides as to $35,000, the interest of which is devoted to professorships, that the trustees should annually exhibit to the Legislature a just, true and circumstantial account of their proceedings in relation to the disposition and application of that interest. We would not, however, be understood as supposing that the Legislature was in that respect visitatorial. It is an unfit and incompetent body to exercise such powers. It may then be asked who are the visitors as to the funds of the College? We answer, the courts of law and equity, and no other body or person. In case of abuse, interest will always

raise up complainants; besides which, the Legislature has taken care to ensure annual information respecting the funds most subject to malversation, and it may at any time direct the Attorney-General to prosecute, and the trustees are answerable, either in law or in equity, for every misapplication or mismanagement of the trust funds committed to their care. This is the doctrine of the Engli h law, extracted from an abundance of cases, and laid down in 2d Kyd on Corporations, 187, "where the persons for whose benefit a charity is established, are not themselves incorporated, but trustees or governors are appointed, as in the case of Sutton's hospital, the governors have a kind of visitatorial power with respect to the objects of the charity, but where no visitor is expressly appointed, and the legal estate of the endowment is vested in the governors, the latter, as to the management of the revenues, are subject to the jurisdiction of the court of chancery"

The same law is very clearly laid down by Mr. Justice Story. In the case of Dartmouth College, in 4th Wheaton, 675, he says: "It is a general rule, that if the objects of the charity are incorporated, as, for instance, the master and fellows of a college, or the master and poor of an hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees and governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character." And again, in p. 676, "where indeed the visitatorial power is vested in the trustees of the charity in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not therefore placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the court of chancery, not as itself possessing a visitatorial power or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trusts, to redress grievances and suppress frauds." The same learned judge, after setting forth in detail the provisions of the charter of Dartmouth College, by which the funds and their management and the legal estate of the lands and revenues were vested in the trustees, says, (p. 681,) "the whole government and control, as well of the officers as of the revenues of the college, being with his (the founder's) consent assigned to the trustees in their corporate character, the visitatorial power, which is included in the authority,

rightfully devolved on the trustees. As managers of the property and revenues of the corporation, they were amenable to the judicial tribunals of the state; but as visitors, their discretion was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied."

We are therefore very clearly of opinion that the Regents have no visitatorial powers over Union College, according to the technical or common law sense of the words *visit* and *visitations*, used in the act by which they are incorporated, except in the single case of appointing a President in the event therein provided for; but that in every other respect they are entirely vested in the trustees of that institution, subject only to the interfering and correcting power of the competent tribunals of the country in case of an abuse, or misapplication of the funds.

THOMAS ADDIS EMMET,
JOHN WELLS,
DAVID B. OGDEN.

New-York, June 30th, 1823.

Opinion of the late Chancellor Kent, relative to the controversy between the Regents of the University and the trustees of Union College.

The documentary evidence relative to the controversy between the Regents of the University and the trustees of Union College, has been submitted to me for my opinion on the following points arising out of the case, viz :

1st. Whether the Regents possess the visitatorial powers claimed by them over *Union College*, and have a right to require from the trustees an exposition of their financial concerns?

2d. What is the effect and operation of the last section of the act of the 30th of March, 1805, for the endowment of *Union College*, since the adoption of the amended Constitution?

3d. Can the Legislature, without the consent of the trustees of the college, rightfully amend or repeal the clause of the act respecting

Union College, passed the 14th February, 1823, inasmuch as the trustees have filed their assent to the declaration in their charter according to the provision of the act.

The opinions of the late *Chief Justice* and of Messrs. *Emmet*, *Wells*, and *Ogden*, annexed to the case, contain an examination of each of those points with great fullness of detail, and perspicuity and force of argument, and I do not know that it will be in my power to throw any new and strong light upon the case. But as I am requested to state the reasons and authorities upon which my opinion may be founded, and as the application comes from a source entitled to the utmost respect, I have conceived it to be my duty to give to the case an original and attentive consideration, and to state briefly the grounds upon which my conclusions rest, even though I may be obliged to follow in the footsteps of the eminent counsel who have preceded me.

I. That the right of visitation claimed by the Regents does not belong to them, but resides in the trustees of the college, will very satisfactorily appear from an examination of the several statutes relating to the subject.

By the 7th sec. of the act instituting the University, and passed the 13th April, 1787, the Regents are authorized to incorporate colleges, and the colleges so incorported are to enjoy all the corporate rights and privileges enjoyed by *Columbia College*. By the same act the charter to *Columbia* College is ratified and confirmed under the variations therein mentioned, and which do not affect the general rights and privileges conferred upon it by its former charter. Subject to those variations all the "power, authority, rights, privileges, franchises, and immunities, before granted to and vested in the governors of the college of the province of *New-York*, are vested in the trustees of *Columbia* College;" and if we recur to the charter of *King's* College, granted in 1754, and referred to in the act, we shall find, that the governors of that college had power to build houses and dispose of the property, and appoint the president and other officers of the college, and fill up their own vacancies as to such members as did not hold the trust *ex officio*, and with power to suspend or discharge the president and professors, and other officers, and to prescribe the course of instruction, and make by-laws for the government of the college, and enforce the same.

Under this act of 1787, the Regents granted the charter to *Union* College, in 1795. By that charter it appears that a number of persons had made the requisite application to the Regents to found *Union* College, and disclosed the plan and the funds with which the college was to be endowed, and named the trusteess, and that the funds intended by the applicants were duly secured and vested. The trustees were accordingly declared to be a body corporate, with perpetual succession, and power to hold real and personal estate, and to appoint the president and other officers and to prescribe the course of study, and to make laws and ordinances for the government of the college, and with all the corporate powers and privileges which the Regents were empowered to grant.

By this charter and the statute under which it was granted, the trustees of Union College possess the powers of the trustees of Columbia College, and they possess the powers of the governors of the college, instituted in 1755. They possess, therefore, the entire visitatorial powers, incident to the case. The founders of this great public charity are represented by the trustees, who by the terms and force of the application under the statute, became the assignees of the rights of the founders. The right of visitation in colleges and other charitable establishments, resided at common law in the founder or first giver of the revenues, and the first applicants in this case, were the persons who provided the funds upon which the charter was granted—they were the endowers or perficient founders, and would of common right have been vested with the right of visitation, if the nature of the application, and the provisions in the act under which it was made, did not amount to an appointment of the trustees as the sole depositaries of that power.

I think that there can be no doubt that the powers given by the charter of 1754, to the governors of King's College, and which have been vested by statute in the trustees of Columbia College, and in the colleges created by the Regents, were the same efficient powers which the common law gave to the founders of eleemosynary corporations. These powers authorised the visitor to judge according to the ordinances of the college, and to suspend or discharge the officers of the college, and to hear all appeals and decide definitively upon them; and these are the very powers conferred by statute upon the trustees. This visitatorial power the founders and authors of the charity, con-

sent to have vested in the trustees by the very application to the Regents, and the question does not appear to me to be susceptible of the least difficulty. It is most fit and proper that this power of visitation in the common law sense of it, should be vested in the trustees of the respective colleges, because they assemble and act in the very place of those institutions, and have in each case a special and direct and undivided care of its concerns, and an intimate knowledge of its wants. And it is worthy of notice, in the examination of this subject, that the act of the 1st of May, 1784, did vest in the Regents this right of visitation in respect to Columbia College, and that the Legislature afterwards by the act of 1787, recalled that power and transferred it to the trustees. This fact is a pretty plain and striking illustration of the sense of the government, that the trustees of the college and not the Regents of the University, where the suitable body for the reception of the power.

The direction given to the Regents to "visit and inspect all the colleges, academies and schools in this state, to examine into the state and system of education and discipline therein, and make a yearly report thereof to the Legislature," affords not even a plausible color for the assumption on the part of the Regents of any visitatorial powers in the technical or common law sense of the power of visitation. The words *visit* and *visitation* in the 3d and 12th sections of the act of 1787, must be taken in reference to the whole subject matter of the statute, and the different provisions to which they apply. These words are there used in an ordinary and popular and not a technical sense. The object of the visit is declared. It is *to examine into the state and system of education and discipline therein and to make a yearly report to the Legislature.* The object was merely to give encouragement to the literary institutions, and to quicken their laudable zeal by the presence of a portion of the Regents, and to afford to the Legislature a correct annual view of the state and progress of public instruction. The purpose of the visit in defined. It is confined to *inspection* and *examination*, and the special mention of this object and silence as to all others, is decisive evidence that this was the only object within the purview of the law. *Expressio unius est exclusio alterius.* If the high and transcendent common law powers of visitation was intended, it is granted in respect to all the incorporated *academies*, as well as to the *colleges.* The grant of the power applies equally to all; and yet, by the 12th section of the act of 1787, it is

declared that the appointment of "*Trustees for each of the academies with competent powers to manage their funds, and superintend the morals and education of the scholars, and the conduct of the principal, master and teachers, would greatly conduce to their security and prosperity.*" The very creation of trustees was thus required for the purpose of receiving and exercising the power of visitors, and the trustees of every academy incorporated by the Regents, are, by the 14th section of the act of 1787, vested with the usual and requisite visitatorial powers. They have power to appoint the officers of the academies, and to remove and displace them at pleasure; to make by-laws for the government and discipline of the institutions, and for the disposition of the revenues, and the management of every matter and thing relating to the academy in their sound discretion.

Most clearly the whole visitatorial power over the incorporated academies resides in the respective boards of trustees, and not in the Regents, and yet "for the greater encouragement of such academies, and to render them more useful and respectable, the Regents shall be visitors of them." But how visitors? The very next part of the section explains it: "The Chancellor, vice chancellor, or a committee of the Regents, shall, as often as they see proper, visit such academies, to inquire into the state and progress of literature therein." The whole object and purpose of this visitation on the part of the Regents, was simply to give encouragement to the institutions by their presence, and to enable them, by an actual examination to lay before the Legislature annually, a correct and comprehensive view of our literary establishments. This has hitherto been the received and practical construction of the powers and duties of the Regents. They did formerly appoint one or more of their body to visit the several colleges and academies, and the visit and examinations were actually made for many years, and were at length discontinued, when the multiplication of the institutions rendered the duty burdensome and expensive.

I conclude, therefore, with the entire conviction, that the Regents have no visitatorial power over the colleges in the common law sense of the term, except in the appointment of a president, when the office is left vacant for a year; and that this power of visitation resides in the trustees. The Regents have consequently no right to require the trustees of Union College to account to them for the management

and disposition of their funds. The management and control of the college funds belong to the trustees, in the first instance, and they are subject, like all other trustees, to the jurisdiction of the courts of justice, and are amenable in chancery for an abuse of trust in the misapplication of their funds. Union College had not received any funds from the State, nor the promise of any, when their charter was granted, and the doctrine of the case of *Dartmouth College* vs *Woodward*, which has been referred to by the other counsel, applies to this with peculiar force. Dartmouth College was equally a charitable establishment, incorporated upon an analogous contribution, and the founders of it were represented by the corporation, who became the assignees of their rights, and as the ordinary powers of collegiate government were vested in the trustees, they became vested with the sole and exclusive power of visitation. And I cannot allude to that case without observing, that the principles which are there declared and illustrated by the high authority of the supreme court of the United States, are applicable to every branch of the case before me. When Union College was, by the act of the 30th of March, 1805, endowed by the Legislature with additional and liberal funds, the trustees were authorised to apply the same in the manner directed by the act, and they were required to exhibit annually to the Legislature an account of their proceedings, in relation to the disposition and application of the funds. This very provision necessarily implies that the trustees were not in any way amenable to the Regents, and the assumption of such a control on the part of the Regents is evidently erroneous, and repugnant to the policy and the provisions of the law. The trustees are liable to be called to an account in chancery, for an abuse of trust. This is the true, and the safe, and the efficient visitation to which they are subject, in respect to their money concerns, and they are not subject to any other.

II. The pecuniary grants by the Legislature under the act of the 30th of March, 1805, were upon the express condition and stipulation that the trustees of Union College should consent to an amendment of their charter, in respect to the number and appointment of the trustees. They did accede to the condition, and the charter was amended in the manner pointed out by the act upon the application of the trustees. The charter thus amended became a contract between the government and the college, equally binding and inviolable as the original charter, and it could not be altered in any respect or degree

by the Legislature, or by any other representative body acting in behalf of the people of this State, without the assent of the college, because it rested upon the faith and sanctity of contract. I consider this to be a clear proposition, incapable of any just doubt or denial. The charter so amended was placed under the protection of the constitution of the United States, and the case of *Dartmouth College*, vs *Woodward*, may be again referred to as containing principles entirely applicable to this case, and decisive upon this point. That case contained no new doctrine. It was only a full and striking illustration of the moral and political obligation of contracts, and of this great truth that States were moral persons, capable of becoming efficient parties to a compact with individuals, and of being equally susceptible of obligation. In the very case of Columbia College, it was once attempted in the Legislature to take away from the trustees and to vest in the Regents the right to fill up vacancies, but the bill was returned by the council of revision on the 3d of April, 1807, with objections, and it was shown with satisfaction to the House of Assembly, that the attempt, without the consent of the corporation, was improper, and would impair or violate the charter. I fully concur in the opinion of the late chief justice, that it would be equally against the constitution of the United States, to impair the obligation of a contract by an act of a state convention, as by an act of a state Legislature; and any increase or reduction of the number of trustees, without the consent of both parties to the charter, is an essential variation of the contract, and consequently unconstitutional and void. In the present case, the ex officio trustees were reduced, by the act of the convention reducing the number of judges, from the number eleven to the number nine. This was a very material alteration of their amended charter, without their act or consent. The ex officio trustees, from being a majority, were reduced to a minority of the board, and by this means the Regents would, in the appointment of the residue of the trustees, acquire the entire control of the board, contrary to the condition upon which the corporation surrendered their right to appoint their own trustees.

I am strongly inclined to the opinion, that this inadvertent infraction of the charter, as amended under the act of 1805, gave to the college the right to reassume and stand upon their charter of 1795. It is impossible that the college could be bound to accede against their will to such an infraction, and there would seem to be no reme-

dy left for them without some new modification of their charter by mutual consent, but to recur to their rights under the charter as it originally stood. Fortunately, however, such a modification did take place under the act of the 14th of February, 1823, which increased the number of ex officio trustees by the addition of two, and by declaring that *vacancies thereafter occurring in the trustees, not ex officio, should be filled in the same manner as vacancies had before been filled.* This alteration however, was made upon the express condition that the trustees should duly file their consent thereto. That consent having been given, we are led to the consideration of the third point.

III. Whether the Legislature can rightfully amend or repeal the act of last February, without the assent of the trustees of the college ?

It is sufficient merely to state this proposition, to perceive the necessary answer. It is not to be presumed or admitted for a moment, that this act did not pass advisedly. The alteration in the charter, upon the assent of the trustees, became a new contract, equally binding as the charter itself ; and the Legislature can no more interfere with it, and impair its obligation, than in any other case of vested rights, resting upon compact. It would be indelicate to presume that any such design could be in contemplation. It would be a plain and palpable breach of contract, and a violation of the constitution of the United States.

JAMES KENT.

New-York, November 25, 1823.

REPLY

Of the Trustees of Union College, to the Opinion of the Attorney-General.

To the Honorable the Legislature of the State of New-York :

The trustees of Union College respecfully represent, that the report of the Attorney-General, on the controversy between the Regents of the University and the trustees of Union College, was withheld until so near the close of the session, that it was not in their power to communicate the following remarks before the Legislature adjourned.

Having at length procured that official document, they perceive that it is distinctly stated therein, that "with respect to the doctrines of the common law, in regard to the power of visitors and the manner in which they are to be exercised, there does not appear to be any important difference of opinion between the Regents and the trustees; and that they fully agree in the meaning of the terms visit and visitation used in the statute, provided those terms are to be considered as used in their *technical* and *common law* signification." They do not, however, perceive that it is as distinctly stated, that on this *precise point* issue had been joined, and that *its* decision must decide the controversy. And yet that so is the fact, will appear from the recorded declaration of both the parties:—"The words *visit* and *visitation* the Regents (say they) have conceived to be used, not merely in their common acceptation, but being terms of known legal import and effect, to have been introduced into the statute with reference to their *technical signification*. The framers and revisers of the act well knew that at common law, all corporations were liable, as a necessary incident to their creation and existence, to be *visited*, in the technical acceptation of the term, and that the reason assigned for it in the books was, that as these bodies were composed of individuals subject to human frailties, and therefore apt to deviate from the ends of their institution, the law in

this mode provided proper persons to *visit*, inquire into and correct all irregularities that might arise in them."*

"Whereas the trustees *deny* that they are *visitors* in *this sense*, even with respect to the course of education and system of discipline, so far as Union College is concerned."†

Without deciding whether the trustees *are* or *are not* amenable to the Regents, as visitors, in the common law sense of the term, which had been claimed by the one party and disputed by the other, the report closes with the following comprehensive and apparently conclusive words: "Upon the whole matter, therefore, the Attorney-General is of opinion, that the Regents have the right to inquire into the state of the funds of the college, and that the trustees of the college, or other proper officers ought to answer such inquiries."

To a person who had not read the documents submitted to the Attorney-General, it would naturally appear that the *real* question at issue was here met and decided, and that it was decided in favour of the Regents. Still the trustees are unable to perceive that the opinion here thus formally expressed, has *any* bearing whatever on the existing controversy.

To what extent the Regents have the right to inquire into the state of Union College, whenever they shall visit it by themselves or by their committees, as the statute directs, has surely never yet been in dispute between the parties. The trustees of that institution have uniformly and cheerfully answered every inquiry thus addressed to them. And they should have been happy to have answered the Regents more fully, and more frequently, than it has been in their power to do, so seldom, of late, have their visits been performed. More than this: the trustees did even answer the inquiries respecting the state of their funds, addressed to them from Albany, in the mandamus of the Regents, issued on the 24th March, 1823, though the manner of making those inquiries was offensive, and though the terms were replete with imputation: and that they did do this will be apparent by reading their replication addressed to the Regents, and their detailed report to the Legislature, to which the Regents were referred.

* Report of Regents, printed documents, p. 32.
† Report of trustees, printed documents, p. 13.

But though the trustees answered the inquiries thus addressed to them by the Regents, they admit that they accompanied that answer with a respectful, but explicit, avowal of their conviction, that the demand had been illegally made. And this they did, as they supposed, in conformity to the opinion of the Attorney-General, who, on being consulted, advised (as they understood him) to report as to the facts; and since they questioned the right of the Regents to require such report, to accompany the same with their reasons for questioning that right; and this they did do, and this is the extent of their offending.

The real question in dispute, therefore, is, whether the Regents, *without visiting* the college at all, either by themselves or their committees, have the right, *as visitors in the common law* sense of the term, to issue from the place of their sittings in Albany, their mandamus requiring the trustees to answer them in *that* place, at the time, and for the purposes, and in the terms, and to the extent set forth in *that precept*. At least this is certainly what both parties had supposed to be the real question in dispute.

Hence the trustees, in commenting on this *novel*, and as they conceived illegal measure, say, "It will be seen, by the mere inspection of the documents referred to, how far it was due to the trustees of Union College, they do not say, to request explanation or information, but to demand *both*, in the style in which *both* have been demanded during the entire term of eighteen years; accompanying the demand with assertions and statements calculated to excite public alarm and destroy public confidence."*

And hence the Regents, in defending this same measure, (after stating that a copy of their requisitions had been "duly served on the officers of the college," and that a communication had been received in reply, which, "after animadverting upon the facts and arguments adduced by the committee of the Regents, denies, in terms, the authority of this board to require the information called for by this board,") proceed to say, that "by the fair interpretation of the statute, the Regents have conceived their authority coextensive with the known technical meaning of the terms in which it is conveyed, and equivalent to the powers of general visitors, at common law, excepting in so far as those powers are restrained and qualified. * *

* Report of trustees, printed documents, p. 13.

* * They conceived that the Legislature intended to establish in them an authority of this nature, to be applied in all cases of endowment from the State, or from resources raised or contributed under its authority; * * * * and they also conceived, that a case had presented itself, which called for the exercise of their powers, as an incumbent duty. Acting under these impressions, they have attempted to interfere on the occasion in the manner now in question."*

And that the Regents fully understood that the MANNER in which they had attempted to interfere was in question, is still further apparent from the pains taken to impress the Legislature with a sense of its legality. "That the authority vested in the Regents" (say they) "is to be confined to mere personal visits, in the common acceptance of the word, by themselves or their committees, to all the colleges, academies, and schools in the State, or that the supposed limited power of legal visitation is to be exercised only in that mode, will not be seriously contended for by any who consider the end and objects to be obtained by the exercise of the power; who reflect upon the nature of the power itself, as recognized before the statute, or are aware of the practical construction of it, which has been adopted by this board. * * * * For when, from the multiplication of these institutions, it became impracticable for the Regents to pay personal visits of inspection to all of them, by means of their committees, * * * * these personal visits of inspection were discontinued, and the spirit, if not the letter, of the law more effectually obeyed, by requiring annual reports to be forwarded by their trustees to this board."†

Such being the question at issue, according to the understanding of the parties, the trustees did expect that the Attorney General would either have pronounced this unexampled proceeding of the regents, which has occasioned the whole controversy, to have been illegal, or that he would have adduced some authorities, if any existed, to establish its legality. He has not, however, so far as they can perceive, deemed it incumbent on him to do either: on the contrary, leaving this novel claim, set up by the Regents, undecided; though it be the real claim and the only claim of theirs ever controverted by the trustees, he has been satisfied with merely declaring it as his opinion,

* Report of Regents, printed documents, p. 34.
† Report of Regents, printed documents, p. 24.

"*that the Regents have the right to inquire into the state of the funds of the college.*"

Without wishing, at this time, to controvert this right, which the Attorney General, as seems to the trustees, has substituted for discussion and decision, in place of *the right* which they had heretofore deemed it their duty to controvert: and that it may not be thought that they have thus sought to avoid the further consideration of the subject altogether, they beg leave to mention a few of the instances in which they have not been able to perceive, either the relevancy or the conclusiveness of the arguments which have been thus collaterally, and as appears to them gratuitously, adduced.

The language of the 3d sec. of the *Act to institute a University*, passed 13th April, 1787, so far, says the attorney general, as it is now material, is as follows: "It shall be lawful to and for the said Regents, and they are hereby authorized and required to visit and inspect all the colleges, academies and schools which are or may be established in this State; examine into the state and system of education and discipline therein, and make a yearly report thereof to the Legislature; and also to visit every college in this State, once a year, by themselves or by their committees, and yearly to report the state of the same to the Legislature."

In reasoning on this section, the Attorney General arrives, by two different processes, at the same result, both of which processes appear to the trustees irrelevant and inconclusive. His words are, "the records of the board of Regents, and their annual reports to the Legislature, show that they have, for a long time, (and it is believed they have, in fact, always,) claimed, and whenever they thought proper, exercised the right of inquiring, not only into the state and system of discipline and education, in the academies, but also into the state of their funds."

"In the annual report made to the Legislature, in 1805, by the board of Regents, the Legislature are informed that the Regents have required annual returns from the different academies, according to a prescribed form, which enables them to exhibit at one view, the state of all the academies that have complied with the regulation; and that for the then last year, a statement was annexed to the annual report. This will be found to contain statement of the *funds* of those institu-

tions, real and personal, and of the annual income derived from those funds, as well as from tuition. In the year 1813, the Honorable the Assembly, passed a resolution calling upon the Regents to report to that House, among other things, the state of the several academies in the State; the number of students educated in the same respectively, and *the funds belonging thereto.*

"It is believed that these transactions are sufficient to show the early and continued opinion of the Regents, the acquiescence of the academies, and the corroborating opinion of the Legislature, in favor of the right to make inquiries as to the funds belonging to those institutions. And if so, then admitting the power of the Regents as to colleges, to be merely coextensive with that which they possess as to academies, the argument before alluded to, on which it has been contended that they are excluded from the right of inquiring into the funds of the colleges, fails at its foundation."—pp. 12, 13.

Now on the mere reading of the foregoing section of the act of 13th April, 1787, quoted by the Attorney General, it is apparent, as seem to the trustees, that the language in which it is expressed is *mandatory.* Every thing, therefore, which the Regents are thereby authorized to inquire into and report on, they are *commanded* to inquire into and report on, and that annually. If, therefore, the first clause of this section authorised inquiries to be made into the fiscal concerns of academies in 1805, it authorized this in 1787; and if it *authorized* this *then*, it required this *then;* and required too that report thereof should be made yearly, and every year thereafter, to the Legislature.

How is it then to be accounted for, that the fiscal state of academies, which ought, (if the interpretation now contended for be correct,) to have been not only inquired into but *reported on* annually by the Regents from 1787, should for the first time, have been reported on in the year 1805? Whence arose, at this late period this new feature in the administration of that board? No new rights or duties could have sprung up in 1805, under an act passed in 1787. Were the Regents themselves ignorant for near twenty years, of the extent of the powers conferred, and the duties imposed by the act which created them?

That the Regents, in 1805, reported to the Legislature the fiscal state of academies, is admitted. But did they do this *then* and for

the *first time*, by virtue of an act of 1787, or had some other and later act passed, vesting them with new trusts and imposing on them new duties with respect *to academies*, which trusts and duties did not extend *to colleges*?

The Attorney-General does not intimate that any such act had passed: nor do the Regents intimate this. On the contrary, both proceed in their argument as if the rights and duties of the Regents depended entirely on the construction to be given to the original act of 1787, in which act both colleges and academies are included. And yet it is the fact, that after 1787, and before 1805, a special act passed reposing new trusts in the Regents, and requiring new duties of them with respect to *academies*, and with respect to *academies only*; colleges and schools not being even named therein.

Out of this special and more recent act, as appears to the trustees, has arisen this special and more recent procedure of the Regents with regard to academies, on which the Attorney-General rests with so much confidence this part of his argument.

The special and more recent act alluded to, is an act for the encouragement of literature, passed 3d April, 1801; and the words of the material part of it are, "The managers aforesaid, after the drawing of each lottery, shall forthwith pay out of the net amount or avails thereof, the sum of twelve thousand five hundred dollars, to the Regents of the University of the State of New-York, for the purpose of being by them distributed among such and so many of the academies as now are or hereafter may be erected in this State, in such proportions and to be appropriated in such manner as they shall judge most beneficial for the several academies, and most advantageous to literature."

Now if it be not the case, that the requiring of fiscal returns in 1805, after a prescribed form, and the annexing of a corresponding statement of revenues to their own annual report for that year, were both *special* acts performed by the Regents in consequence of the foregoing *special* statute, how happens it that both should be so *expressly* and yet so *unaccountably* restricted to academies? Since, if those acts were performed, as the Attorney-General assumes that they were, in obedience to the clause of the section of the statute of 1787,

on which he is commenting, then ought they also to have been performed with respect to colleges as well as academies: nor could such an invidious distinction have been made without a manifest violation of duty, for every thing enjoined in that clause with respect to the *one* institution, is enjoined and in the same express terms with respect to the *other* also.

The Attorney-General proceeds:—"But to consider this matter in another point of view, suppose that the construction of the act by which it is said the Regents are excluded from all inquiry into the funds of academies, is, so far, correct; still, the conclusion which has been drawn from it, that they can not inquire into the funds of *colleges*, is by no means a necessary inference. If the statute had stopped short, after enacting that the Regents should visit all colleges, academies and schools, examine into the state and system of education, and discipline therein, and make a yearly report thereof to the Legislature, there would have been better ground for contending that their power, as to colleges, could not extend beyond an inquiry into these enumerated subjects. But the very next clause of the same section proceeds to direct that they shall also visit every college in this State, once a year, by themselves or by their committees, and make a yearly report of the *state of the same*, to the Legislature. Now, unless this extends to something more than the mere state and system of education and discipline, which had been already provided for, in the next antecedent clause, then those who originally drew the act, those who first passed it, the subsequent revisers of the laws, the Legislatures which have repassed it at those subsequent revisions, have been content to encumber the statute book with useless and nugatory repetions." * * * * "*And to say that it needs nothing than that which preceded it*, is to charge with voluntary tautology, all who have been concerned in drawing, passing, revising or repassing the act."—*p.* 13.

Be it as the Attorney General asserts; still does it follow, that because the latter clause of this section means *something* not meant by the *former*, that therefore *that something* must be not *what is* expressed in the clause itself, but what *is not* expressed in it, not even intimated in it, or in the section or in the statute; but which, nevertheless, the argument of the commentator requires to be supplied. If so, then he is consistent in supposing that an investigation of the *pecunia-*

ry situation of the colleges is comprehended in the additional meaning of this latter clause. But let it be observed, that an ecclesiastic would be equally consistent in supposing that an investigation of the *religious belief* of the college, or a politician in supposing that an investigation of the *political opinions* of the college, was also comprehended in it.

Let the report speak for itself: "If this be so," continues the Attorney General, "then it remains to inquire whether the latter clause, at least, in the section, does not properly involve *some investigation of the general concerns and pecuniary situation of the colleges* which are certainly among the most important matters connected with the prosperity and success of those institutions." * * * *

* "Indeed, no full and fair view can be taken of the general state of such an institution, without some knowledge of the pecuniary means which it possesses, and upon which it must, more or less rely, for its continuance and support." * * * * *

"A further reason for inquiry by the Regents, into the funds of the institutions under their supervision, grows out of the organization of the board itself." * * * * * * * *

The Legislature wisely considered the interests of science, as deserving its watchful and parental attention; and with a view to uphold and promote them, instituted THIS BOARD of general supervision, intended to possess funds which have since, been in part bestowed upon it, that in the contest between knowledge and ignorance, it might stand as a sort of *corps de reserve* on the field, having a general view of all operations, and ready to throw in its aid, at those points where it should be most wanted, and where it would be most likely to ensure such success as would be gratifying to the friends of science." *

* * "In order to determine where the public bounty can be most properly and effectually bestowed, to accomplish the purposes of the Legislature, it is necessary that THE BOARD WHICH HAS THE DISPENSATION OF IT, should extend its inquiries beyond the state and system of education and discipline, in the several seminaries among which it is to be distributed." * * * * * *

* * "*A judicious distribution of the funds of the Regents, appropriated for such purposes, must, therefore, more or less, depend upon a knowledge of the fiscal concerns of the institutions who may become participators in the bounty.*"—p. 14.

To all this, as a matter of fancy and embellishment, the trustees have nothing to object. The considerations suggested why the *clause in question* should contain *the enactment in question* are plausible, but they are, nevertheless, nugatory, since in point *of fact* it does *not contain it*. And the idea of the Regents standing as a *corps de reserve*, in the field of controversy, between knowledge and ignorance, possessing funds, and ready to throw in their aid at those points where it should be most wanted, though agreeable, is a mere illusion, having no existence, as the trustees believe, so far as colleges are concerned, but in the mind that conceives it. Did the Attorney-General mean, when penning this argument, that it should be understood that the Regents did perform with respect to colleges the office here assigned them? And that they were possessed of funds to be distributed among them in the manner here specified? If he did not mean this, neither the beauty of the passage, nor the plausibility of the argument it insinuates, can justify its introduction into an official document. If he did mean this, *much less* can its introduction be justified, unless it be conformable to realities that exist *elsewhere* than on the page that contains it.

The trustees are aware, though the Attorney-General has taken no notice of it, that the Regents have been entrusted by the State, as already mentioned, with funds to be distributed in the manner above stated, among academies. But academies are not included in the clause, the construction of which is under consideration; nor is it with the rights of the Regents over academies, but with their less doubtful and more clearly extended right over colleges, that the argument of the Attorney-General is concerned. And if it be the fact, as the reader of that argument must suppose it to be, that the Regents are also intrusted with funds for distribution, at their discretion, among colleges; and that, "*in order to determine where the public bounty can be most properly and effectually bestowed, it is necessary that the board, which has the dispensation of it, should extend its inquiries beyond the state and system of education and discipline in the several seminaries among which it is to be distributed.*" If this be the fact, the trustees are ignorant of it, and can, therefore, only say, that the argument, which proceeds throughout, on the assumption of this fact, would have struck them as being more relevant and conclusive had the Attorney-General stated the amount of the funds so entrusted to the Regents for distribution among colleges; by whom they were be-

stowed; what particular benefactions were in contemplation, with reference to which, as seems to be intimated, their mandamus to Union College was issued, and where the statute can be found that has made, in behalf of colleges, these benign and salutary provisions which form the basis on which this whole reasoning appears so securely to rest.

But though this information were not needed, and though the argument of the Attorney-General for his favorite construction of the clause under consideration, were better supported by facts, than for the want of such information it appears to be, still, as would seem to the trustees, before the construction contended for by him, or any other conjectural construction can be resorted to, there is a previous question to settle, to wit: Does this *latter clause* enact any thing *in terms*, not enacted in the *former clause*? And if it does, *what is it* that it *thus enacts*?

By adverting to the section under consideration, it will be apparent that the former clause enacts, that the Regents "*visit and inspect all the colleges, academies and schools, which are or may be established in this State; examine into the state and system of education and discipline therein, and make a yearly report thereof to the Legislature.*"

Though the *right* and the *duty* of visiting are here specified, neither *the manner*, nor *the frequency* of visiting are prescribed; whereas the latter clause, (the words of which are, "*And also to visit every college in this State once a year, by themselves, or by their committees, and yearly report the state of the same to the Legislature,*") *in terms* prescribes BOTH. Two *distinct* enactments are therefore contained *expressly* in this *latter* clause, which are not contained in *the former*, to wit: that the prescribed visit shall be made to *every college* in this State ONCE A YEAR, and that it shall be *a personal visit* made by THE REGENTS OR BY THEIR COMMITTEES. Now it appears to the trustees that these two enactments, neither of which, certainly, are contained in the former clause, and both of which certainly *are* contained in the latter; are sufficient to save from the imputation of "*voluntary tautology*," both the framers and revisers of this statute, without the expedient of supplying any gratuitous and conjectural meaning. And that it formerly appeared thus to the Regents themselves, is evident from the fact, that they continued to visit the colleges, annually, by their committess, even after the special act of

1801, already referred to, had passed, and after they had under its authority required annual returns to be made by academies according to a prescribed form: and even after they had ceased altogether to visit, annually, the colleges, they still continued for years, to evince their convictions as to the construction of this clause by annually appointing under it, for the several colleges, committees of visitation.

The Attorney-General admits that "If the statute had stopped short after enacting that the Regents should visit all colleges, academies and schools, examine into the state and system of education and discipline therein, and make a yearly report thereof to the Legislature there would have been better grounds for contending that their power, as to colleges, could not extend beyond an inquiry into these enumerated subjects. But the very next clause of the same section proceeds to direct, that they shall also visit every college in this State once a year, by themselves or by their committees, and make a yearly report of the state of the same to the Legislature.

But for this *latter* clause *then*, the Attorney-General being judge, the right of the Regents to inquire beyond the foregoing enumerated subjects, would be less clear than it is. This *latter* clause, however relates *exclusively* to colleges; and yet the Regents, executing a trust under both clauses, require, as early as 1805, fiscal reports from academies, which are *not comprehended* in the *latter clause*, and where their right (according to the doctrine of the Attorney-General) to *do this* is therefore *less clear*, and they neglect until 1823, to require fiscal reports of colleges which *are comprehended* in the *latter clause*, and where their right to make *such requisition* is therefore *more clear.*

Again: if it be the right of the Regents, under this latter clause, to require of the several colleges fiscal reports, then is it their duty to require them, for the language is not permissive but mandatory. And if it be their duty to require of the college fiscal reports, then is it *their duty* to make, with respect to the colleges, to the Legislature fiscal reports; for all they are authorized to inquire into, they are *directed to report upon.* If, therefore, the construction for which the Attorney-General contends, with so much zeal and ability, be the true construction, then it has been the bounden duty of the Regents, ever since 1787, to have made yearly and every year a report to the Legislature, concerning *the fiscal condition* of every college in this State;

and yet, though they have yearly and every year, as will appear by the journals of the two houses, reported *the system of education and discipline* in the said colleges, they have not at the expiration of near forty years, even begun *to report annually* the *financial state* of these institutions, so long since entrusted to their care.

Since, therefore, the Regents themselves have so long and so uniformly put the same construction on this clause which the trustees now put upon it, they trust that they shall not be deemed to be without apology, even though they should be deemed to be in error. For if it has required so many years for the Regents, enrolling on the catalogue of their members many of the brightest ornaments that have adorned either the bench or the bar of the State; to arrive at the novel construction recently discovered; it ought not to be expected that the trustees of Union College, a corporation signalized by no such assemblage of legal talent, should arrive at the same result by a readier process or in a shorter time.

In concluding, the trustees would only remark, that they are aware that they are parties, and as such liable to bias. But they are also aware that the Regents and the Attorney-General, (who is a Regent) are likewise parties and therefore liable to the like infirmity; and without meaning any disrespect, they think it may be said, that the opinion of that officer, (who had become a party before the documents were submitted to him) drawn up on the present occasion and under the influence of existing prepossessions, is entitled to less confidence and ought to be received with greater caution than would be due to it on a different question and under other circumstances. And especially may this be said since it is well known that the Regents themselves are materially divided on the subjeet. Several of the oldest, of the ablest, and most distinguished lawyers and statesmen, now belonging to that board, have not only held, but regardless of interest and influence, have had the independence and the magnanimity to avow a directly contrary opinion. In which contrary opinion they have been supported not only by the concurrence of the former Chancellor and Judges, but also by the concurrence of many and, so far as the trustees have been able to learn, by the concurrence of all the numerous and distinguished individuals who once held but have now relinquished their seats in that board.

With respect to the repeal of the act of 14th February, 1823, which appears to have been so presented in this report as to invite a

second reference, and to prepare the way for a second and more satisfactory expression of opinion, the trustees beg leave to say, that it appears to them that the Attorney-General has removed the *only pretext* on which the original argument of the Regents, in favour of the repeal of said act, was founded.

They say expressly in their mandamus, "*That the number of elective trustees has not as yet* BEEN REDUCED TO TEN: and because it has not, that the effect of the law in question "*is to prevent the possibility of the ex officio trustees ever* FORMING A MAJORITY OF THE BOARD, * * * * * * *and deprive the State of all efficient influence and control, in the direct management of the institution.*"

The Attorney-General says "It is due, however, to the college to say, that since the present reference, the treasurer of that institution has informed the Attorney-General, that the number of elective trustees had been reduced to ten, and has given him a list of names amounting to ten."

Now if this be due to the college, with what reason and for what object is this part of the controversy continued? And why has the Attorney-General, *since* he was informed of this, evinced the same personal solicitude that the act should be repealed that he before evinced? If it be not *true* in point *of fact* as the Regents have stated, that the effect of the passage of the law in question, "*is to prevent the possibility of the ex officio trustees ever forming a majority of the board?*" If, on the contrary, the reverse of this be true; if it be true that before this act was passed, the ex officio trustees had been by the reduction of the number of judges, under the new constitution, reduced to a minority; and if it be *true*, that the passage of this act, by substituting in the place of the two former judges, the Governor and Lieutenant Governor, has actually *restored* to the ex officio trustees their former *majority*; and if it be *also true*, that if this act were now to be *repealed*, the ex officio trustees would by such repeal be again reduced to a minority, with what consistency is its repeal still pressed upon the Legislature? Since it is not to be questioned that the Regents truly stated the reason which induced them to recommend this measure, and since it is at length apparent that the reason stated has no existence, how is it to be accounted for that the measure itself should notwithstanding be persisted in?

It is no longer pretended that the passage of this law has taken any thing from the ex officio trustees; on the contrary, it is admitted that its repeal would do this, and that the Regents and not the college are to be the party benefited; and benefited contrary to the solemn stipulation of the Legislature made March 30th, 1805. In such a complete reverse of circumstances, and when the *precise evil* is to be produced by this measure which the Regents appeared to be so anxious to *prevent;* and when, should it be carried, they will *themselves*, wrest from the state the very advantage which they were at first so desirous that the State should retain, it is certainly surprising, that the members of that board should be *now* as *formerly*, its most zealous advocates.

With respect to the rights of the Legislature to repeal this act, which the Attorney General has argued at large in his second communication, the trustees will not in this place make a single remark. For though they apprehend that the opinion so confidently expressed, is as unsound in point of law, as the representation of circumstances on which it is founded, appears to be partial and distorted in point of fact, they do not wish even to agitate that question.

The trustees have never expressed any peculiar partiality for the provisions of that act. At the commencement of this controversy they proffered to the Regents to waive its protection, and to refer the whole case to the Chancellor and Judges, and they are still willing to make and to abide such reference.

That the compact entered into between the trustees and the State, under the act of March 30th, 1805, has been *violated* on the part of the State, by the practical operation of the new constitution, will not, it is believed, be denied by any impartial man. Nor will it be denied, that good faith required that some new and satisfactory provision should be made, to prevent the evils liable to result from such violation. And though the provisions contained in the act in question, have been deemed by the trustees satisfactory; and though notwithstanding the Attorney General questions it, they have accepted the same, they are by no means tenacious on this subject. If any other and satisfactory substitute can be devised, that will be more acceptable to the Legislature, the trustees shall cheerfully acquiesce in it.

But that the repeal of this act should have been introduced into both houses of the Legislature, by a special communication from the Regents, setting forth, in error as is now admitted, the operation thereof, and grounding the necessity of its repeal on the pretence that its effect, contrary to the *intention of the Legislature in passing it*, would be "*to prevent the possibility of the ex officio trustees ever forming a majority of the board.*" And that after this unjust and injurious statement had been recorded on the journals, published in the papers, and permitted to operate uncontradicted on the Legislature and on the public for a year; that the Attorney General though repeatedly requested by the trustees to make his report early in the session, should, notwithstanding, so delay it as to bring up the question a second time, amid the hurry that precedes adjournment; and that the personal influence of that officer, should be brought to bear upon the question with as much zeal as if it were not now known that the reasons originally assigned, were founded in mistake; that all this should have taken place, has indeed excited the surprise and regret of the trustees.

And though they have no objection to any new and equitable arrangement that may be either now or hereafter substituted, they have considered the repeated attempts which have been made to induce the repeal of the act in question, at the times, and in the manner, and under the pretence already alluded to, to be equally injurious and unjust; and they flatter themselves that the Legislature, as well as every honorable and unbiassed member of that community they represent, will admit that they have not without reason so considered it.

All which is respectfully submitted in behalf of the trustees, by

ELIPH'T NOTT.

(A.)

APPENDIX,

Containing the material facts relative to the acceptance of the condition of the act of February 14th, 1823.

At a meeting of the board of trustees, held July 21st 1812, a resolution was passed in the following words:

"*Resolved*, That the president of this board be authorized to make application for the purpose of reducing the number of trustees, necessary to make a board for the transaction of business, to the number of eleven, and also to be reinvested with the power of electing their successors in office."

At a meeting of the board of trustees of Union College, held the 23d day of July, 1822, a quorum being present, a resolution in the following words was passed:

"*Resolved*, That the trustees resident in Schenectady, when convened together with such as may be present from abroad, be and they are hereby invested with full powers to transact all the business of the institution, that may require to be transacted at any time when this board is not in actual session, as fully and effectually as the same could be transacted by the board itself."

At a meeting of the trustees resident in Schenectady, held 9th day of April, 1823, conformably to the above resolution of the board, the following resolution was adopted:

"Whereas a resolution has been passed by the board of trustees, authorizing application to be made to the Legislature, for restoring the right of filling vacancies which had been voluntarily relinquished:

and whereas a law has been passed, February 14th, 1823, proffering such restoration—

"Therefore, *Resolved*, That the treasurer make out, in form, the acceptance of the board of trustees, and having affixed the seal and procured the signature of the president thereunto, that he cause the same to be filed in the office of the Secretary of this State, as the law directs."

Conformably to the foregoing resolution, an acceptance was made out and filed on the 11th day of April, 1823, in the words and figures following, to wit:

"Whereas, by the last section of the act, entitled 'An act to amend an act, entitled an act relative to the city of Schenectady,' passed February 14th, 1823, it was recited and enacted as follows: 'Whereas, by the existing charter of Union College, the Chancellor, the judges of the supreme court, the Attorney General, the Secretary, the Comptroller, the Surveyor General, and the Treasurer, are *ex officio*, trustees thereof—And whereas, by reducing the number of the justices of the supreme court, under the present constitution, the number of said trustees will be reduced—Therefore,

'*Be it enacted*, that the Governor and Lieutenant Governor, for the time being, shall be added to the number of trustees, *ex officio*, already belonging thereunto: the trustees not *ex officio*, to be and remain the same in number as they at present exist in said board, aad vacancies hereafter accruing therein, to be filled in the same manner as vacancies have heretofore been filled: *Provided*, the board of trustees of said college shall consent thereunto, and file such consent in the office of the Secretary of this State.'

"Now, therefore, know all men by these presents, that the said board of trustees of Union College have accepted, and do hereby accept the conditions of the said act as above recited, and in evidence thereof the seal of the board has been affixed to this their acceptance, and the same caused to be filed in the office of the Secretary of this State.

(L. S.) ALEX. PROUDFIT,
President."

At a meeting of the trustees of Union College, held July 22, 1823, at which meeting nine members were present, the Governor and Lieut. Governor being two of them :

"Read the report of the resident trustees—*Resolved*, That the same be accepted, ratified, and entered on the minutes."

The report was in the following words:—"The resident trustees report, that whereas a resolution was passed by the board of trustees, authorising an application to be made to the Legislature, for the restoring of the right of filing vacancies therein, which right had heretofore been voluntarily relinquished; and whereas an act was passed by the Legislature, February 14, 1823, proffering such restoration, that they directed the treasurer to make out, in behalf of the board, their acceptance, and having affixed the seal and procured the signature of the president thereunto, to cause the same to be filed in the office of the Secretary of this State, as the act directs, which was done accordingly."

Conformably to the foregoing ratification, a certificate was filed in the office of the Secretary of this State, on the 10th of December, 1823, in the words following:

"Whereas a committee was heretofore appointed by the board of trustees of Union College, to procure a reinvestment in said board of the right of filing vacancies therein, which right had been voluntarily surrendered to the Regents of the University; and whereas an act was passed February 14, 1823, by the Legislature of the State of New-York, proffering to said board the restoration of said right, on the conditions therein contained; and whereas the trustees resident in Schenectady, did, by virtue of authority previously vested in them by the said board of trustees, accept, in their behalf, of the conditions of said act, and did cause said acceptance to be filed in the office of the Secretary of this State, and did make report thereof to the said board of trustees of Union College, at their meeting July 23, 1823; and whereas it was thereupon resolved, by said board of trustees, to accept and ratify said report of the resident trustees and the acts therein set forth.

"Now, therefore, and in evidence of the acceptance of the conditions of said act of February 14, 1823, by the trustees of Union

College, as set forth in said certificate already filed, and which has been sealed with the seal of said board, signed by the president thereof, and directed to be filed in the office the Secretary of this State as said act directs.

(L. S.) ALEX. PROUDFIT,
President of the Board."

Schenectady, July 23, 1823.

The foregoing is believed to be a correct statement of the whole proceedings had in relation to the act of February 14, 1823.

(B.)

Extracts additional from the report of Gov. Marcy, &c.

On the 13 of April, 1814, (*Vol.* 3, *Laws N. Y.* (*b*) *p.* 142, *sess.* 27.) an act instituting a lottery, for the promotion of literature, was passed; in which $200,000 was granted to Union College; $40,000 to Hamilton College; $4,000 to the African Asbury Church; $30,000 to the College of Physicians and Surgeons, together with the interest thereon for six years; in which time it was contemplated that the same would be drawn and paid. And in and by another act, passed April 15th, 1814, (*Vol.* 3, (*b*) *p.* 257,) for the payment of certain officers of government, an additional sum of $12,000 was authorised to be raised in the same lottery, for the Historical Society.

On the 5th of April 1822, (*Vol.* 6, (*a*) *pp.* 157,) an act was passed to limit the continuance of lotteries; in and by which the institutions interested in the aforesaid lotteries, were authorized to assume the management of the aforesaid lotteries, and to receive the avails thereof in lieu of the grants made to them, provided they would consent to do so for a term of years less than the State would require for drawing said lottery, and at an average sale of tickets annually, not exceeding in amout the average amount of sales during the last preceding five years; both the time and amount to be fixed by certificates of the Comptroller, to be filed in the office of the Secretary of State. (§ 19)*

On the 9th April, 1822, the Comptroller (§ 46) filed his certificate fixing the time the State would require for drawing said lotteries.

On the 24th July, 1822, a resolution (§ 27) of the trustees of Union College was passed as follows, to wit: Resolved, That the treasurer of this board be authorized by and with the consent of the President of the college, to accept, under the seal of this board, of the provisions of the act to limit the continuance of lotteries, passed April 5th, 1822. And

*See printed documents, corresponding number.

that the said treasurer be further authorized, under the seal of this board, to assume such responsibilities, and to give and take such securities, and to make such contracts relative to the lottery instituted for the promotion of literature or any part thereof, and to pledge or alienate such property belonging to this board, in carrying the same into effect, as the President of the college shall approve; to whose supervision the same is hereby committed, with authority to exercise, in behalf of this institution, all those powers vesting in it by virtue of the aforesaid act to limit the continuance of lotteries.

On the 29th July, 1822, a contract (§ 29) was signed between J. B. Yates and Archibald McIntyre, and the trustees of Union College. By which contract Yates and McIntyre were, (in addition to two and one-fourth percentage on the gross amount of schemes, to be deposited to the credit of the President of the college, being the legal per centage allowed for the management of the lotteries,) to pay to the treasurer of the college for the lottery, the sum of $276,090.14-100; the same to be paid, if preferred by Yates and McIntyre, in ten equal annuities, of $39,312 each, on which a rebate of interest was to take place if paid in advance.

In a letter dated January, 4, 1826, (§ 80) (but which is stated to have been subsequently written for the purpose of embodying in a written form, what passed at a personal inserview, held at Schectady on that day, between J. B. Yates, Henry Yates and Eliphalet Nott,) the contractors make known their *perilous condition*, request aid to the amount of $100,000 at once, and further sums thereafter, and proffer, in case it should be furnished them, to pay 11 per cent. on the classes, as the president had previously insisted they were bound to do.

This proffer was, at the time, verbally accepted by the president, who, in full view of the danger, appears to have deliberately made up his mind to incur the hazard necessary to prevent the failure of Y. & McI. and the consequent ruin which such failure must bring upon the college.

On the 17th January, 1826, (§ 84) Mr. J. B. Yates writes from New-York, that if sustained, they can pay all—that he and Mr. McIntyre have looked over the memorandum sent by the president, find nothing amiss in it, and will write an agreement pursuant thereto.

On the 23d Jan. 1826, (§ 86) Mr. McIntyre expresses in a letter his gratitude to the president for the prompt relief afforded them, and requests the presence and advice of Mr. H. Yates the treasurer of the college. He also forwarded a copy of bill for consolidating the lotteries, conformably to the purpose stated by Mr. J. B. Yates at the preceding interview.

On the same day, Mr. J. B. Yates makes a similar request, by letter, in relation to the treasurer of the college. (§ 90.)

In consequence of the requests contained in the above letters, and for the express purpose of guarding more effectually the rights, and furthering the interests of Union College, the president employed, as he states, Mr. Henry Yates, the treasurer and clerk of the board, and soon thereafter a trustee, to go to New-York, *as agent of the college*, and to remain there as much of the time as practicable, until the close of the Literature Lottery. (§ 91.) And agreed to continue to pay the treasurer during his absence, (besides his salary as treasurer and clerk, which he retained,) the sum of $1,300 per annum, out of the funds of the college, and also to pay his travelling expenses &c. while absent.

From a bill in chancery, recently filed by A. McIntyre and others, it appears (§ 93) that the treasurer of Union College, on going to New-York, entered into partnership with Yates & McIntyre, as early as July 1st, 1826. Your committee have inquired how far the president had knowledge and assented to this proceeding of the treasurer; and in reply have been informed that it was wholly without his privity, and that for a *long time* he remained in ignorance of it.

In fulfilment of the engagements made by the president of Union College, (§ 97) in consideration of the foregoing *stipulations*, he did, in connexion with the treasurer, obtain (for the sole use of Yates & McIntyre,) from Wm. James, Esq. deceased, his notes to the amount of *one hundred thousand dollars*, for which, (in addition to a pledge of property belonging to the college,) the president and treasurer gave their own individual bond of indemnity for the entire amount. and the president did also in like manner, on or about the 15th Feb. 1826, contribute towards securing the payment of a loan $40,000, made by T. J. Oakley and others, to Yates & McIntyre, by hypothecating, (in addition to the bond of the college, which was not deemed

sufficient,) as collateral security, bank stock standing in his own name and in that of his wife, together with certain bonds and mortgages, as follows: 179 shares in the Mohawk Bank: 20 shares in the New-York State Bank; 67 full shares in the Farmers' Bank; 176 do. on which $40 each had been paid; 2 shares in the Albany Bank; 17 shares in the Manhattan Company, and 150 shares in the Rensselaer and Saratoga Insurance Company; also, $7,000 worth of bonds and mortgages.

On the 28th April, 1832, H. Yates, J. Ely, Jr. and James McIntyre, addressed a letter (§ 485) to the president of Union College, *declaring their intention not to make any further payments to him*, but to give the per centage, to which he was entitled by stipulation, to J. B. Yates and Archibald McIntyre.

After the contractors ceased their payments, the president remonstrated with them by letter, but their answer being a definite refusal, he proceeded under the advice of the financial committee, with whom he had consulted, and by whose advice he had been governed throughout, to file a bill in chancery, in which this board are joined as complainants.

The committee have deemed it necessary to present this general view of the whole ground, the better to enable the trustees to act upon the paper addressed to the board on the 21st of July last, by Messrs. Yates & McIntyre.

From the best reflection your committee have been able to give this subject, they can not perceive any just ground for questioning the validity of any of the contracts or stipulations under which the parties have acted.

That the trustees designed to clothe the president of the college with plenary powers, to act in their behalf in all cases, upon this subject, while the resolution remained unmodified, is obvious to your committee from the broad terms employed. And that this power was thus conferred, your committee entertain no doubt.

That the contractors so understood it, is evident from the contracts and stipulations by them made from time to time with the president, most of which were entered into on their urgent application.

That the contracts and stipulations have in good faith been performed on the part of the president and of college, is not denied by the contractors.

That as the fruits of these contracts immense profits have been realized by the contractors, seems apparent from their own statement, furnished to the college and contained in the printed documents.

And now that these benefits have been realized by them, your committee have been unable to discover upon what grounds of law or equity, the contractors can, on their part, refuse to fulfil their own stipulations.

In view of all the preceding facts, it has appeared to your committeee—

1. That the embarrassments of Messrs. Yates & McIntyre, according to their own statements, arose from speculations entered into by them, apart from the lottery business, and wholly unconnected with Union College.

2. That such was the nature and extent of their embarrassments, that they would have been ruined, but for the timely and efficient and continued aid afforded them by the president of the college.

3. That the contracts made by them with the president, were upon adequate and full consideration; and that the frequent changes complained of by Yates & McIntyre, were in fact made at their urgent request; and that the repeated modifications have invariably been in their own favor.

4. That the president has furnished extensive means, performed important services, and run great personal hazards, for the contractors on their repeated applications, and this evidently without any sinister motive, without the design of personal gain; but for the sole purpose of aiding the contractors, and of securing and advancing the interests of Union College, or some kindred institution connected therewith.

In conclusion—it has appeared to your committee that Messrs. Yates & McIntyre have received the benefits of a steady and faithful performance of these contracts, and that the interests of the college and of science, as well as the claims of justice, require that the trustees should unite with the president in the proceedings which have been

commenced, or which may become necessary and proper, to obtain a full performance on the part of Yates & McIntyre.

That the course of the president throughout all the novel and difficult emergencies which have occurred in conducting this whole business, has been marked by fairness and liberality towards the contractors, and by firmness, sagacity, and disinterested zeal for the interests of the college and of education.

That the full powers with which he was invested by the trustees, have been exercised with wisdom and success; and from the information they have received of his views in relation to this whole subject, your committee are of opinion that the interest of the college and of science require that these plenary powers should be continued.

Your committee, therefore, recommend, that the Finance Committee be instructed to take the charge and supervision, of all suits with the contractors, in which this board is a party, now pending, or which may hereafter be instituted, or by them be judged necessary for asserting or maintaining the rights of Union College, with authority to employ such professional aid as may by them be deemed proper, and that they be authorized to draw on the treasurer for the expenses which may be incurred in the premises.

Your committee further recommend, that the present treasurer of College be authorized, by and with the advice of the financial committee, to perform hereafter, in any transactions springing out of the supervision of the lotteries, all the acts that the former treasurer was authorized to perform. That by and with the advice of the financial committee, he receive from the president any bonds and mortgages, or other property; taken by him during the supervision of said lotteries; and co-operate with him as far as may be, in the investment and management of any funds that have been or may be hereafter received by him in consideration of personal services rendered and hazards run; but which funds are intended for the ultimate benefit of Union College, or some kindred institution connected therewith.

All which is respectfully submitted.

W. L. MARCY,
SILAS WRIGHT, Jr. } *Committtee.*
JOHN P. CUSHMAN.

The undersigned further states,

That in order to enable the Regents the better to decide how far the imputed fiscal delinquencies aforesaid have been deserved, the entire report of the special committee appointed to examine the facts of the case, is subjoined, together with the documentary evidence in relation thereto; comprehending the entire correspondence of the parties concerned to which is appended the letter of the Hon. Silas Wright, after having, as trustee examined the same.

All which is respectfully submitted.

ALEX. HOLLAND, *Treasurer.*

UNION COLLEGE, *April* 10, 1849

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